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MATERIALS ON CONFLICT OF LAWS

VOLUME IB

January 1995

John Swan

Aird & Berlis
Toronto

Vaughan Black

Dalhousie University
Halifax

We are grateful for the help of many students, now too numerous to mention individually, over the past many years in the constant revisions in the organization and text of these materials.

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Chapter 6

Recognition and Enforcement of Foreign Judgments

INTRODUCTION

A party who has obtained a judgment in a foreign jurisdiction may, under circumstances to be investigated, be able to have that judgment given effect in another jurisdiction. Recognition refers to the process by which the foreign judgment is regarded as validly determining some dispute between the parties. Enforcement refers to the process by which the foreign judgment is transformed into a judgment of the forum upon which execution can be levied. The process of recognition will be relevant if nothing other than the conclusiveness of the foreign judgments is in issue. If one party has a foreign judgment or decree of divorce, recognition in Ontario, if given, will have the effect that the marriage is regarded as dissolved in Ontario so that the parties to the former marriage may obtain a licence to marry in Ontario. Similarly, recognition alone is in issue if the foreign judgment is in favour of the defendant. The largest practical problems centre on enforcement. The plaintiff who has successfully sued the defendant in, say, British Columbia, wants to get the judgment enforced in Ontario so that it can force the defendant to pay when, we may assume, the defendant has assets in Ontario (but not in British Columbia).

At common law, a foreign judgment created a debt upon which an action could be brought in the English courts. It was technically an action of *assumpsit*.

A plaintiff who was successful in the foreign jurisdiction might be unable, as we shall see, to sue on the judgment in Ontario. In that situation the plaintiff could sue on the *original cause of action*. Doing so creates significant risks for the plaintiff: an Ontario court might not agree with the foreign court on the merits of the claims and the plaintiff might be unsuccessful in the action in Ontario. (Remember, for example, the risks arising from the rules of *Phillips v. Eyre*.) The question arises if the *unsuccessful* foreign plaintiff may sue on the original cause of action—there is, of course, no judgment to sue on. In the situation, the defendant will want to argue that the foreign judgment has some preclusive effect on the plaintiff's claim; an effect that prevents the plaintiff from ignoring it. If the foreign judgment does not have a preclusive effect it will not restrict the plaintiff's choice.

The rules regarding the preclusiveness of a foreign judgment are very similar to the domestic rules of *res judicata*, though, technically a foreign judgment is not *res judicata* in the sense that an Ontario judgment will support a claim of *res judicata* for the purposes of further litigation in Ontario. *O'Nory v. Patricia Properties Ltd.* (1983), 144 D.L.R. (3d) 742, (B.C.S.C., McEachern C.J.S.C.), illustrates one rather exotic problem arising under the doctrine of *res judicata*. The plaintiff obtained a foreign judgment in California. The plaintiff brought an action on this judgment and, as the judge held, on the original cause of action. This action was dismissed on consent and a new action on the original cause of action brought in British Columbia. McEachern C.J.S.C., held that the consent order operated, under the doctrine of *res*

judicata to bar the subsequent action. The doctrine applied because there was a earlier *British Columbia* judgment. What the case illustrates is the need to be careful in drafting pleadings when a foreign judgment is involved. The judgment in *O'Nory v. Patricia Properties Ltd.*, though brief, contains a useful collection of the cases supporting the basic propositions stated here.

A foreign judgment, being for a liquidated sum (and only a final[1] judgment for a fixed sum can be enforced) could be enforced by a motion for summary judgment. The *Reciprocal Enforcement of Judgments Act* provides an even more expeditious remedy, though, as we shall briefly note, it does not enlarge the common law basis for enforcement, and indeed, both before and after *De Savoye v. Morguard Investments* (though much more so afterwards) restricted them.

RECOGNITION AND ENFORCEMENT; THE COMMON LAW RULES

The common law rules regarding the enforcement of foreign judgments, as they were developed in Canada and England by both courts and text-writers, remained unchanged from the 19th century until December, 1990. At that time the Supreme Court of Canada decided *De Savoye v. Morguard Investments Limited*, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256, a case which substantially rewrote those rules. Before we can examine that case it will be necessary to spend some time on the old rules. The purpose of this exercise is not purely historical. To appreciate the ways in which the new rules will work it will be necessary to have some idea of what the Supreme Court was rejecting. What is important is that it is not clear that the Supreme Courts's new rules will apply to all situations, so in some instances the old rules may still operate. We will examine the question of the continued operation of the old rules later in this chapter.

The old rules regarding the enforcement of foreign judgments were good examples of the problems that arise from the failure to inquire into the purpose and justification of the rules. It is worthwhile to take some time to explore these issues.

---

[1] There are several cases dealing with what are and what are not "final judgments". A judgment of, for example, a trial judge in British Columbia, is final and may be sued on in Ontario unless a stay is obtained in B.C. Even if a stay is not obtained in B.C., an Ontario court may refuse to enforce the judgment until an appeal is disposed of. In contrast, a judgment of a Canadian court for maintenance is never, until there are arrears, final in any other Canadian court. This rule was the reason for the enactment of the *Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1980, c. 432., and for the large differences between it and the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1980, c. 433.

The basic rule regarding the enforcement of foreign judgments *in personam*[2] was that the rendering court must have had jurisdiction in accordance with the rules of the enforcing court. The leading cases establishing that rule are: *Buchanan v. Rucker* (1808), 9 East. 192, 103 E.R. 546 (K.B.); *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 40 L.J. Q.B. 173 (Q.B.); *Emanuel v. Symon*, [1908] 1 K.B. 320 (C.A.); *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C 670 (P.C.). It is accepted by the following authors: Dicey and Morris, *The Conflict of Laws*, 11th Ed., Rules 37, 43; Cheshire and North, *Private International Law,* 11th ed., pp. 352 *et seq.*; Castel, *Canadian Conflict of Laws*, 2nd ed., p. 240; Hertz, *Introduction to Conflict of Laws* (Toronto: Carswell Co. Ltd., 1978); Sharpe, *Interprovincial Products Liability Litigation* (Toronto: Butterworths, 1982); McLeod, *The Conflict of Laws* (Calgary: Carswell Legal Publications, 1983) Part IV. 2. This rule is unchanged by the decision in *De Savoye v. Morguard Investments Ltd.* What that case changed are the Canadian rules.

A general statement of the rule is that Canadian courts will recognize and enforce a foreign judgment for money when the defendant was personally served in the jurisdiction of the foreign court or submitted (or agreed to submit) to the foreign court's assertion of jurisdiction.

What is the purpose of these rules? A partial response to this inquiry is that it is in the interests of both the litigants and society in general that the costs of dispute settlement be minimized. A party who has litigated its dispute in a foreign tribunal should not be forced to re-litigate the issues all over again. This reasoning applies whether the plaintiff or defendant has been successful in the original proceedings.

As has been mentioned, there is an obvious and close analogy to the domestic rules of *res judicata*; an issue once litigated cannot be litigated again by the same parties. An issue that has become *res judicata* cannot be re-litigated because the original cause of action has merged in the judgment: there is nothing left of the original cause of action *except* the judgment. A foreign judgment does not operate as *res judicata*, for the original cause of action is not merged in the foreign judgment. As we shall see, this is an important fact. Regardless of this difference, the purpose of the rules is the same in both areas.

A more general purpose for the rules would emphasize fairness and justice: a party who has had its day in court, and who has lost, should not put upon the other party the risk of re-litigation and the consequent risk of a different result being reached by the (new) court. In addition, of course, there is the old maxim: "*Interest reipublicae ut sit finis litium*"—it is the interest of the state that litigation be brought to an end. (An excellent and much fuller discussion of the issues

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[2] A judgment *in personam* is a judgment that only binds the parties to the action. For our purposes it is a judgment for damages or for restitution. An order for specific performance is a judgment *in personam* but, not being a judgment for money and not binding anyone outside the jurisdiction of the court that made it, is not enforceable under the rules regarding the enforcement of foreign judgments. A judgment *in rem* is judgment that binds parties not involved in the litigation. A decree of divorce binds not only the parties, the former wife and husband, but the parties' children, the Department of National Revenue, the Ministry of Consumer and Commercial Relations (if a licence must be issued for a marriage) and any future spouse of either party. Judgments *in rem* may be made against ships.

arising on recognition and enforcement is found in Von Mehren & Trautman, "Recognition of Foreign Adjudications: A Survey and Suggested Approach" (1968), 81 *Harv. L. Rev.* 1601.)

Neither efficiency nor fairness is so strong as to justify the enforcement of any foreign judgment. Such a result, fairly obviously, could not be accepted: the foreign court may have behaved in a way that the enforcing court finds offensive or, at least, not so clearly satisfactory as to create the pressure to bring the parties' dispute to a conclusion by recognizing or enforcing the foreign judgment.

There are at least three ways in which the foreign court could behave that the enforcing court might find offensive.

1. The foreign court might have asserted jurisdiction in ways that are unfair to the defendant. The foreign court might have ignored considerations of *forum non conveniens* or might have used unreasonable and arbitrary powers of arrest and seizure to bring the defendant before it.

2. The proceedings might have been unfair: the defendant might have had no way of making an effective defence. He might have received no notice of the plaintiff's claim or of the proceedings, and may have been denied the right to make an effective answer to the claim. The judge or other official might have been bribed.

3. The foreign court might have reached the wrong conclusion on the merits of the dispute. The court might have applied the wrong law in the conflicts sense or if it got that right, it might have applied the wrong rule. It might, for example, have held that the dispute should be resolved by a rule of the enforcing court and it may have got that rule wrong.

In reaching a satisfactory solution to these issues we need to find some criteria by which we can sensibly determine whether what a foreign court did should be regarded as offending any of our concerns. If we take the last one first, we could draw an analogy to the process of review of administrative action. There we take the position that, provided that the tribunal had jurisdiction to make the decision that it did, the courts will not substitute their view of what the correct answer should have been; they will permit the board scope to err.

If we assume or hold that the foreign court had jurisdiction in some appropriate case, then one of the risks run by the defendant is that it might make a mistake. In a sense every person who takes his, her or its case to court takes this risk. An appeal may correct the mistake, but if an appeal is not taken, execution can issue on the incorrect judgment. A defendant over whom a foreign court has jurisdiction must appeal a mistaken or incorrect judgment of a trial court, but again, even then the mistake may persist. The analogy to administrative law is easily seen in cases like *Godard v. Gray* (1870), L.R. 6 Q.B. 139, 40 L.J. Q.B. 62 (Q.B.). A French judgment was brought for enforcement in England. It was established that the French court had misapplied the English rule regarding penalty clauses. The French court had assumed—silly people!—that a penalty clause could be enforced at common law in accordance with its plain words. The existence of this error was not a justification for a refusal to enforce the French judgment. The defendant should have convinced the French court of the error of its ways or appealed the judgment. That he might be ultimately unsuccessful is simply proof the old legal

maxim that, "That's the way the cookie crumbles". A more recent case is *Tracomin S.A. v. Sudan Oil Seeds Co. Ltd.*, [1983] 1 W.L.R. 662, [1983] 3 All E.R. 140. The same situation arises in fraud cases, i.e., where the defendant alleges that the foreign judgment was obtained by fraud. Here the defendant has to take steps to have the judgment set aside in the foreign jurisdiction. If it does not bother to do so, or is unsuccessful in its attempt to do so, the argument that the foreign judgment was obtained by fraud may not be raised in an action on the foreign judgment in Ontario. This rule was established in *Jacobs v. Beaver*, (1908), 17 O.L.R. 496, (C.A.) It was not followed in England in *Syal v. Hayward*, [1948] 2 K.B. 443, [1948] 2 All E.R. 576 (C.A.), but that case may now be "confined to its special facts".

Note that this attitude to foreign judgments is only one possible view to take. The standard might just as easily be that, while a large scope may be left to the foreign court on the merits, certain decisions may be so offensive that the enforcement of the foreign judgment may be challenged. We do allow, for example, for an attack on the decisions of administrative tribunals where the decision of the tribunal is unreasonable or where, to use another technical legal term, the tribunal is "out of its cotton-picking mind". Perhaps the most obvious candidate for such offensiveness would be the unjustified application of forum law, the law of the rendering court. Thus, suppose that a Canadian court is asked to enforce a judgment of a foreign court and it is proved that that court always applies its own law if it takes jurisdiction regardless of the factual context for the dispute. Such a choice of law rule might well be regarded as objectionable, though a Canadian court might worry about the charge of hypocrisy. (It is, as a matter of interest, the rule that a Canadian court will apply in any divorce proceeding before it. *Phillips v. Eyre* is not much better.) It is, of course, not the purpose of this analysis (at least at this point) to say that such a view represents the common law or what the law should be. It is only to suggest what might be the justification for certain possible rules that might be adopted to determine whether a foreign judgment should be enforced or not.

The second ground for objection expresses the general concern of common law courts for natural justice: the right of a person affected to a fair hearing before an impartial tribunal. There is, once again, an obvious analogy to the review of administrative tribunals. It might be expected that, in general, the standard to which the foreign court will be held will be approximately that of the enforcing court. For example, if the enforcing court allows substituted service, a foreign judgment obtained on that basis should not be refused recognition or enforcement simply because the defendant did not receive actual notice of the proceedings, though, as we shall see, the fact that the defendant was not personally served may be prima facie evidence that the foreign court did not have jurisdiction over it to an extent that would justify enforcement. Similarly rules of evidence, admissibility, competence, compellability and privilege would, presumably, cause the enforcing court no problem if they were roughly similar to its own. By and large, these two grounds for objection to foreign judgments have been handled in satisfactory ways. The same is not true of the first.

The first ground could, in principle, be seen as subject to the same standards as the second. Why should a court that is asked to enforce a foreign judgment object if the foreign (rendering) court allowed service *ex juris* in circumstances when the enforcing court would do so itself? If an Ontario court, *ex hypothesi*, sees nothing offensive in subjecting a foreign defendant to its jurisdiction because the plaintiff's claim falls within one of the "pigeon- holes" of Rule 17.02, why should it regard a foreign court as behaving improperly in doing the same? The argument

is, of course, even stronger if the foreign court acknowledged (as might the Canadian court) the importance of the issue of *forum non conveniens*.

One particular problem must be briefly noted here. The common law rules are most obviously applicable as regards service on individual people. Special problems arise with corporations. The rule formally remains the same; the defendant must have been properly served for the foreign court to have jurisdiction. Generally speaking, the requirement means that the corporation must have been carrying on business in the place where it was served. The Rules of Court of each of the provinces usually specify the method of service on the corporation; Ontario *Rules of Civil Procedure*, Rule 16.02, British Columbia, *Rules of Practice*, Rule 11, Nova Scotia, *Civil Procedure Rules*, Rule 10.03. The test would probably be the same for recognition purposes, i.e., a corporation that would be "carrying on business" in a province for purposes of supporting the assertion of judicial jurisdiction, would probably be held to have been properly served in that jurisdiction for the purposes of enforcement. Sharpe, *Interprovincial Products Liability Litigation*, at p. 46, observes that there is surprisingly little authority. He refers to one case, *Sfeir & Co. v. National Insurance Co. of New Zealand*, [1964] 1 Ll.L.R. 330 which adopted the rule laid down in a case of neither recognition nor judicial jurisdiction, but one of the *situs* of a debt in *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139, [1954] 1 All E.R. 145. See also *Frederick Jones Inc. v. Toronto General Insurance Co.*, [1933] O.R. 428, [1933] 2 D.L.R. 660 (C.A.), *Vogel v. R. and A. Kohnstamm Ltd.*, [1973] Q.B. 133, [1971] 2 All E.R. 1428, *Mahon/More Group of Co. Ltd. v. Mercator Enterprises Ltd.* (1978), 31 N.S.R. (2d) 327, 90 D.L.R. (3d) 590 (*sub nom. Moore v. Mercator Enterprises Ltd*) (T.D.).

The issue was explored in *Adams et al. v. Cape Industries plc et al.*, [1991] 1 All E.R. 929, [1990] 2 W.L.R. 657, (C.A., Slade, Mustill & Ralph Gibson L.JJ.). Actions were brought in Texas by 205 plaintiffs against the defendants for damages for injuries caused by asbestos. The defendants had sold the raw asbestos to a U.S. subsidiary which sold it to a firm using it in a factory where the plaintiffs worked. The defendants did not appear in Texas as they had no assets. Default judgment was given against the defendants in Texas for an amount that was based on $75,000 per plaintiff or $15,375,000. The amount that each plaintiff obtained was to be determined by negotiation between counsel for each plaintiff and the defendants. The plaintiffs sought to have the Texas judgment enforced in England. The plaintiffs argued that the defendants were resident in the U.S. because they had a subsidiary in Illinois and used another U.S. company as a marketing agent. The trial judge held that the defendants were resident in the U.S. for recognition purposes, but that the Texas judgment was contrary to English notions of substantial justice because of the way in which each plaintiff's recovery was determined. On appeal to the Court of Appeal, the appeal was dismissed. Slade L.J. said:

> In relation to [the] trading corporation, we derive the three following propositions from consideration of the many authorities cited to us relating to the "presence" of an overseas corporation.
>
> (1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ("an overseas corporation") as present within the jurisdiction of the courts of another country only if either

(i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a "branch office" case), or

(ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.

(2) In either of these two cases presence can only be established if it can fairly be said that the overseas corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.

(3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation:

(a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation;

(b) whether the overseas corporation has directly reimbursed him for

(i) the cost of his accommodation at the fixed place of business,

(ii) the cost of his staff;

(c) what other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative;

(d) whether the representative is remunerated by reference to transactions, eg by commission, or by fixed regular payments or in some other way;

(e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative;

(f) whether the representative reserves

(i) part of his accommodation,

(ii) part of his staff for conducting business related to the overseas corporation;

(g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation;

(h) what business, if any, the representative transacts as principal exclusively on his own behalf;

(i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it;

(j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.

The decision contains a useful discussion of the scope of the "natural justice" basis for the refusal to enforce a foreign judgment.

Until very recently Canadian and English courts did not respond to the issue raised by the first ground for objection in a principled way. While the grounds upon which a Canadian court can take jurisdiction have been steadily expanded, there was no change in the rules regarding the recognition and enforcement of foreign judgments from the time they were established in 1870 until 1990.

The basic "old" rule is that the defendant must either have been physically present in the jurisdiction of the rendering court when she was served with the writ of summons or its equivalent, or have submitted to the jurisdiction of the court. Submission may be in one of four ways (though the first two are similar):

(i) an unconditional appearance to the writ,

(ii) the submission of a defence on the merits,

(iii) an agreement, pursuant to a contract or, perhaps, under special legislative provisions as, e.g., in the *Insurance Act*, s. 54, to submit, and

(iv) the choice of the foreign court as the forum for litigation by the person who is now sued on the foreign judgment or against whom the judgment is raised.

It is impossible to overemphasize the narrowness of the approach of Canadian courts to the question whether a foreign judgment will be recognized or enforced. They ask only whether the foreign court had jurisdiction in accordance with the rules of the *enforcing* court or not. The ground on which the foreign court took jurisdiction is irrelevant. Only after the foreign court has been found by the enforcing court to be a court of competent jurisdiction will the existence of defences like fraud be investigated. It is strange that this is one of the conflicts rules that is

most often forgotten. Lawyers persist in wasting their clients' money by retaining, for example, Québec counsel to discover the effect in Ontario of a Québec judgment. *Only Ontario* rules determine the effect of a Québec judgment in Ontario. Only evidence acceptable to an Ontario court will determine if the Québec court had jurisdiction for purposes of recognition or enforcement in Ontario.

The first or second kinds of submission, i.e., the making of an unconditional appearance or the raising of a defence on the merits, will be examined in the next case. The fourth kind causes few problems in practice. The third has given rise to some cases that suggest fairly far-reaching *contract* concerns. Thus in *Batavia Times Publishing Co. v. Davis* (1977), 18 O.R. (2d) 252, 82 D.L.R. (3d) 247, (affirmed, (1979), 26 O.R. (2d) 800, 105 D.L.R. (3d) 192) the defendant entered into an agreement submitting to the jurisdiction of certain foreign courts and empowering "any attorney of any court of record of Pennsylvania, New York, Canada or elsewhere to appear for and to enter judgment against me in favour of" the plaintiff. A Pennsylvania Court gave judgment against the defendant. The Ontario trial judge, Carruthers J. said, (pp. 254, 255, 256 (O.R.), pp. 250, 252 (D.L.R.)):

> The only issue then to be decided in this case is whether the defendant is entitled to impeach the judgment upon which the plaintiff's action is based on the ground that the proceeding in which it was obtained was conducted contrary to the principles of natural justice. The defendant maintains that he is entitled to impeach the judgment because he received no notice of the plaintiff's intention to obtain the judgment with which we are dealing in this case. As indicated above, the defendant does admit that the proceedings in Pennsylvania were regular inasmuch as the procedure of the Court allowed a judgment to be obtained where the promissory note authorizes any attorney of the Courts therein mentioned to appear for, and to enter judgment against, him in favour of the plaintiff for the amount in question. The defendant maintains that notwithstanding this authorization and even accepting the fact that the procedure leads to a validly rendered judgment in Pennsylvania, which is enforceable in Pennsylvania, further notice should have been given by the plaintiff of its intention to enter judgment on the note before it did so. The failure to do so, the defendant maintains here, infringes upon the principles of natural justice, thus rendering the judgment unenforceable in this jurisdiction.
>
> There appeared to be no quarrel between the parties that the Court in the State of Pennsylvania did possess international jurisdiction in cases where, as here, the defendant had contracted to submit himself to the forum in which the judgment was obtained.
>
> . . .
>
> Counsel for the defendant referred me to a number of decisions which he indicated supported his position that even though everything was done properly within the State of Pennsylvania, absence of notice to the defendant before judgment was entered infringed the principles of natural justice and, therefore, the judgment is unenforceable in this Province. I have read all of the cases to which I was referred and it appears from reading them that in none of those cases was there a situation similar to that with which we are dealing here, namely, a situation where the defendant had contracted to submit himself to the forum in which the judgment was obtained and included in that contract was an authorization to an agent to appear on behalf of the defendant to enter judgment against the defendant. In every case to which I was referred, the proceedings leading up to the judgment had simply been commenced without any or adequate notice being given to the defendant. I do not think, therefore, that these cases are applicable to the present situation.
>
> I, therefore, find that the plaintiff is entitled to recover from the defendant the sum of $16,940.63. . . .

The kind of clause found in this case is fairly standard boiler-plate in many American standard form contracts. The wording is often exactly similar to that found in the case. These clauses are normally subject to the usual controls on contract power: the power to control unconscionable conduct on the part of one of the parties. See, e.g., Jackson and Bollinger, *Contract Law in Modern Society*, 2nd ed. (St. Paul: West Publishing Co., 1980) pp. 806, 807. A more comprehensive list of cases is found in Mandel, *The Preparation of Commercial Agreements*, 1978 Edition, (New York, Practising Law Institute, 1978) p. 69. It might have been expected that the judge would have treated the clause with more hostility, given the view of the courts as to exemption clauses generally. The difficulty facing the defendant would be the usual focus on the nature of the clause—Is it an "exemption" clause (whatever that might be)?—rather than on the function of the clause in the context of the parties' agreement.

Under the old rules submission through the making of an unconditional appearance and of a defence on the merits, raised a very awkward problem, one that could cause a lawyer a great deal of difficulty, agony and concern for her insurance coverage. A lawyer acting for a client in Ontario might be asked for advice when the client is sued in, for example, British Columbia, after having been served *ex juris* under the *Rules of Court* of the British Columbia Supreme Court. If the client has a basis for arguing that the British Columbia court should not take jurisdiction *under its own rules*, should the client appear before the British Columbia Court to argue this point? The choice before the client may be between a default judgment in British Columbia (which may be unenforceable in Ontario because made without jurisdiction) but which may catch any assets that the client may have or later bring into British Columbia, or a judgment possibly enforceable in both British Columbia and Ontario because of a voluntary submission by appearance in British Columbia. The dilemma of the client (and its lawyer) is well illustrated in the next case. Most of the leading cases in the area are mentioned in the judgment.

Henry v. Geoprosco International Ltd.
[1976] 1 Q.B. 726, [1975] 2 All E.R. 702.
(C.A. Cairns, Roskill & Browne L.JJ.)

[The plaintiff, a Canadian resident in Alberta, entered into a service agreement in Canada, with the defendant company for employment. The company, registered in Jersey, had its head office in London, and had no branch or assets in Canada. The agreement was to be governed by English law and had an arbitration clause. The plaintiff was later dismissed by the defendant company, and he commenced an action for damages for wrongful dismissal in the Supreme Court of Alberta, by serving the defendant with a statement of claim in Jersey. The defendant company then applied by motion to the Supreme Court of Alberta for an order to set aside service *ex juris* on the grounds that the affidavit in support of the motion was defective and that Canada was not the *forum conveniens*; alternatively it sought a stay of proceedings on the basis of the arbitration clause. The defendant's motion was dismissed, and the decision was upheld by the Alberta Court of Appeal. The defendant did not take any further part in the proceedings and the plaintiff obtained a default judgment for $41,879.

[In an action in England by the plaintiff to enforce the judgment, the defendant pleaded that it had not submitted to the jurisdiction of the Supreme Court of Alberta and were therefore not bound by the judgment. The trial judge, Willis J. held that since there had been no hearing on the merits of the plaintiff's action in that court, the defendant had not submitted to the jurisdiction of the Supreme

Court of Alberta and the plaintiff's action for enforcement was dismissed. The plaintiff appealed. The Court of Appeal allowed the appeal and entered judgment for the plaintiff. The judgment contains an exhaustive analysis of the English cases under the traditional rules. Roskill L.J., giving the judgment of the court, stated its position on the issue:]

If, therefore, a defendant enters a conditional appearance or takes some other comparable step, he is thereby conditionally agreeing to submit to that jurisdiction. If his application to set aside service then fails, that condition is fulfilled. But in the arbitration cases there is no such conditional submission.

Though this question was fully discussed in argument before us, it does not arise for decision since, as already stated, the counsel for the defendants properly conceded that he could not argue in this appeal that the respondents had done no more than protest against the jurisdiction of the Supreme Court of Alberta, having regard to the terms of their notice of motion and notice of appeal. We, therefore, say no more than that we are not deciding that an appearance *solely* to protest against the jurisdiction is, without more, a voluntary submission.

But we do think that the authorities compel this court to say that if such a protest takes the form of or is coupled with what in England would be a conditional appearance and an application to set aside an order for service out of the jurisdiction and that application then fails, the entry of that conditional appearance (which then becomes unconditional) is a voluntary submission to the jurisdiction of the foreign court. The defendant need not appear there, conditionally or unconditionally. He can stay away. But as the cases say, he may prefer to take his chance upon a decision in his favour. If he does so, he must also accept the consequences of a decision against him.

> We appreciate that on this view the dividing line between what is and what is not a voluntary submission and what is and what is not an appearance solely to protest against the jurisdiction is narrow and may often be difficult to draw satisfactorily. But, as we think, it must depend in each case upon what it was that the defendant did or refrained from doing in relation to the jurisdiction of the foreign court.

NOTES

1. *Henry v. Geoprosco* was considered by the British Columbia Court of Appeal in *First National Bank of Houston v. Houston E & C Inc.*, [1990] 5 W.W.R. 719. The court noted (at 725) that

> a litigant can by the acts he does or which are done on his behalf attorn although he has no intention of doing so as was indeed the case in the *Henry* decision. He is nonetheless attorning even if he has been given erroneous legal advice as to what constitutes a submission or what the result will be of the act which he does.

2. In *Re McCain Foods Ltd.* (1979), 26 O.R. (2d) 758, 769; 103 D.L.R. (3d) 734 (C.A.) it was said (by Blair J.A.):

> In dismissing this appeal we are not to be taken as approving the view of Cromarty J. that the [defendants] by entering a conditional appearance and applying to set aside the writ voluntarily attorned to the jurisdiction of the New Brunswick Court and, consequently, were bound by that court's decision. This view was founded upon *Harris v. Taylor*, [1915] 2 K.B. 580, and *Henry v. Geoprosco Int'l Ltd.*, [1976] Q.B. 726, which decisions have attracted considerable criticism. There is no need to consider these authorities for the purposes of our decision in the case. We do not consider ourselves bound by them and we reserve our view on them for another day.

The effect is that counsel for a defendant served *ex juris* may find it easier to tread the narrow line between submission and an appearance solely to dispute the jurisdiction of the foreign court. But while the line here may be wider than in England, it is, nevertheless, a narrow one and counsel has to be very clearly aware of the limits he or she must respect. Any invitation to the court to discuss the merits of the case will be foolish.

3. In *Clinton v. Ford* (1982), 37 O.R. (2d) 448, 137 D.L.R. (3d) 281 (C.A.) the issue concerned the enforceability of a South African judgment. In 1976 the parties were both resident in South Africa. The defendant (a solicitor) agreed to buy a car from the plaintiff. The defendant repudiated the contract, and in 1977 he moved to Ontario. In 1978 the plaintiff started proceedings in South Africa and obtained an interim order for the seizure of land in South Africa owned by the defendant. The defendant delivered the equivalent of a Statement of Defence and defended the action on the merits, but took no further part in the proceedings. The plaintiff sought enforcement of the judgment in Ontario.

Houlden J.A. giving the judgment of the Court, referred to *Henry v. Geoprosco*, to *Dicey & Morris* (10th Ed. 1980 vol. 2, pp. 10-50) and the question asked by the editors regarding that case: "How far does this represent the common law rule?", and quotes their answer: (p. 451 O.R., p. 285 D.L.R.)

> First, it is clear that an appearance is not involuntary at common law merely because it is motivated by the fact that the defendant has property within the jurisdiction of the foreign court on which execution may be levied in the event of judgment going against him by default; still less is an appearance involuntary when it is made because, although the defendant has no property within the jurisdiction of the foreign court, his business often takes him there, so that the judgment might be made effective against him. Secondly, an appearance is not involuntary when it is made after execution has been levied under the judgment in order to rescue the property which is the subject-matter of the execution. Thirdly, *if property is seized and the defendant appears and defends the case on the merits, the appearance is not involuntary.* But there are weighty dicta to the effect that an appearance merely in order to save property arrested or attached as a basis of the jurisdiction of the foreign court will not be regarded as voluntary at common law. Thus there may be cases in which the defendant may appear to oppose the seizure on jurisdictional grounds; e.g., where he denies he has property within the jurisdiction or where he challenges the validity of the seizure. In such cases, at any rate, the appearance should not be regarded as voluntary. (Emphasis mine.)

Houlden J.A. continued:

> In the present case, the defendant could have elected to ignore the proceedings in South Africa. If he had done so, the South African judgment would clearly not have been enforceable against him. However, if he had followed this course of action, he would have lost his property in South Africa even though there might have been no basis for jurisdiction of the South African court, or even though the seizure of his property was invalid. In my opinion, the defendant should have had the right to appear in the South African action for the purpose of (a) contesting the validity of the seizure of his property, or (b) contesting the jurisdiction of the South African court, without attorning to the jurisdiction of the South African court: see *The Duplis*, [1912] P. 8; *Henry v. Geoprosco International Ltd.* at pp. 747-48; *Cheshire and North on Private International Law*, 10th ed. (1979), at p. 640; Beale, *A Treatise on the Conflict of Laws* (1935), vol. 1, para. 82.6, pp. 352-53.
>
> There is no proof before us that it is possible in South Africa to enter a conditional or limited appearance. However, even if this is not possible under South African procedure, the defendant in his defence to the application for summary judgment or in his plea could have limited his defence to the two matters that I have mentioned. Instead, he chose to defend the action on the merits. Having sone so, I think that his appearance was a voluntary one, notwithstanding the seizure of his property prior to the issue of the edictal citation. He is, therefore, bound by the South African judgment: see Read, *Recognition and Enforcement of Foreign Judgments* (1938), p. 161.

The following case deals with what is a comparatively uncommon situation, *viz.*, the use of a foreign judgment as a defence to an action brought in another jurisdiction. In theory, the rules are the same for both plaintiff and defendant: the judgment of a foreign court will be recognized when the foreign court had jurisdiction in accordance with the rules of the recognizing court. In practice, the rules must operate differently. In commercial cases the issue of recognition, as the sole focus of the inquiry, arises only in cases where one party has obtained a foreign judgment and the other now wants to re-litigate the dispute over again. The issue here is one of issue estoppel, since the foreign judgment cannot, for technical reasons, be regarded as *res judicata*.

When the foreign court (or any court, for that matter) dismisses a plaintiff's claim, it may have done so on any one of a number of defences raised by the defendant: that the action was brought out of time; that another court is a more appropriate forum or the contractually chosen forum; that the pleadings are defective; that the judge believed the witnesses for the defence rather than those of the plaintiff; that no damages were suffered by the plaintiff; etc. When judgment has gone for the plaintiff, on the other hand, it must have been on the basis that *all* the arguments of the defendant have been dismissed. A judgment in favour of the defendant on one of the grounds raised by that party, still leaves it open to the plaintiff to try another attack on another basis. It is this fact—all too often

ignored by those who discuss the topic—that creates, in part, the differences between recognition and enforcement.

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.
[1975] A.C. 591; [1975] 1 All E.R. 810, (H.L.)
(Lords Reid, Dilhorne, Wilberforce, Diplock & Simon)

[The plaintiff, an English company, sued the defendant, a German company with no assets in England, on two bills of exchange that were drawn, negotiated and payable in England. Just before the limitation period under English law expired, the plaintiff sued in the District Court of Munich. The German court dismissed the action on the ground that the limitation period under German law had expired. The plaintiff began another action in England and the defendant moved to have its set aside. The master and the trial judge refused leave. The Court of Appeal reversed this decision and set the writ aside. The plaintiff appealed to the House of Lords.

[The defendant argued that the plaintiff could not sue in England because the matter had already been disposed of in its favour by the German court. The question before the House of Lords was the scope of s. 8 of the *Foreign Judgments Reciprocal Enforcement Act* 1933. The section provided:

> (1) Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.
>
> (2) This section shall not apply in the case of any judgment:—(a) where the judgment has been registered and the registration thereof has been set aside on some ground other than—(i) that a sum of money was not payable under the judgment; or (ii) that the judgment had been wholly or partly satisfied; or (iii) that a the date of the application the judgment could not be enforced by execution in the country of the original court; (b) where the judgment has not been registered, it is shown (whether it could have been registered or not) that if it had been registered the registration thereof would have been set aside on an application for that purpose on some ground other than one of the ground specified in paragraph (a) of this subsection.
>
> (3) Nothing in this section shall be taken to prevent any court in the United Kingdom recognizing any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before the passing of this Act.

> Every plea of a former judgment in bar ought to set forth so much, at least, of the judgment as would shew that it was final and conclusive on the merits. (at p. 394 *per* Bethell, *arg.*)
>
> No one contends that the judgment and the proceedings should be set out in full, but we should have such a description of them as would enable us to know what was decided. (at 394 *per* Lord Brougham.)

So, in my opinion, to say that in a case such as the present the English court must stop at the first line of the German judgment and ignore the rest is irrational and out of line with what the courts do. And then "conclusive": conclusive of or as to what? The respondents say "conclusive that the cause of action on which the foreign proceedings were brought no longer exists". But the subsection does not say this: the words "in all proceedings founded on the same cause of action" merely describes the occasion on which the conclusiveness arises. There is nothing here—and, I add in passing, nothing in Part I of the Act—to indicate that the conclusiveness is to extend, irrespective of what the judgment decided, to the whole of the cause of action. Why should we give to the judgment a greater force than it receives by the law of the country where it is given? Certainly the law of Germany does not say that the cause of action does not exist.

In my opinion, therefore, an interpretation of both "judgment" and "conclusive" which would require courts in this country to examine the judgment, see what it decided, and hold it conclusive as a judgment and for what it adjudicates, is both open on the language and is entirely consistent with the common law. To quote another leading authority: "As to whatever it meant to decide, we must take it as conclusive." *Bernardi v. Motteux* (1781), 2 Doug. K.B. 575, 581 *per* Lord Mansfield C.J.

> The appellants finally relied strongly on the wording of s. 8(3) of the 1933 Act. I agree with my learned and noble friend Lord Simon of Glaisdale. . . . [Lord Simon said that section 8(3) "was inserted as a saving provision and by way of reassurance. . . . [It] was not intended as a substantive provision to deal with issue estoppel in contradistinction to cause of action estoppel dealt with in section 8 (1)."]
>
> In my opinion, if this case had arisen at any time between 1869 and 1933 there could be no doubt how it would have been decided. I see no reason why the 1933 Act should be understood as intending to bring about a different result. The language of s. 8(1) does not so compel. The German judgment would be conclusive for what it decided and for nothing more. The appellants' claim has not been decided on the merits, and they should be allowed to pursue it. This being my conclusion on the second point, it is not necessary to decide the first. I prefer to reserve my opinion on whether s. 8(1) applies to defendants' judgments.

NOTES

1. If we are going to understand the judgment and what it means we have to get behind the German judgment and ask what it really decided. To do this we have to consider the purpose of a limitation period. One stated purpose

of such a rule is given by the Ontario Law Reform Commission, *Report on Limitation of Actions*, 1969, at p. 9:

> Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of Peace".

2. To what extent does the decision of the German court represent a decision based on the need for a purposive application of the German legislation? If the German court was not making a purposive application, what was it doing? If we don't know what the German court was doing, how can we possibly make sense of what effect the judgment should have?

3. If, on the other hand, the German court was saying that the plaintiff's action should be barred because any other result would be unfair to the defendant, then surely the judgment should be recognized as a disposition of the merits of the case. The plaintiff, by choosing the German court and by taking the risks associated with that choice, cannot reasonably complain if the court decides that its action is unfair to the defendant.

De Savoye v. Morguard Investments Limited et al
[1991] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256.
(S.C.C. Dickson C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.)

The judgment of the Court was delivered by

LA FOREST J.:-- This appeal concerns the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there. Specifically, the appeal deals with judgments granted in foreclosure proceedings for deficiencies on sale of mortgaged property.

Facts

The respondents, Morguard Investments Limited and Credit Foncier Trust Company, became mortgagees of land in Alberta in 1978. The appellant, Douglas De Savoye, who then resided in Alberta, was originally guarantor but later took title to the land and assumed the obligations of mortgagor. Shortly

taken in the United States through the instrumentality of the Due Process clause of the Constitution of the United States; see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Whether the Canadian counterpart to the due process clause, s. 7 of the Charter, though not made expressly applicable to property, might at least in certain circumstances, play a role is also unnecessary to determine.

There are as well other discretionary techniques that have been used by courts for refusing to grant jurisdiction to plaintiffs whose contact with the jurisdiction is tenuous or where entertaining the proceedings would create injustice, notably the doctrine of *forum non conveniens* or the power of a court to prevent an abuse of its process; for a recent discussion, see Elizabeth Edinger, "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 *U.B.C. L. Rev.* 1.

There may also be remedies available to the recognizing court that may afford redress to the defendant in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction. Here, too, there may be room for the operation of s. 7 of the Charter. None of these questions, however, are relevant to the facts of the present case and I have not given them consideration.

. . .

I would dismiss the appeal with costs.

NOTES AND QUESTIONS

1. The distinction the Supreme Court draws between intra-federal and international situations is a significant innovation. As we have seen, the traditional approach of Canadian courts in all areas of conflicts—jurisdiction, enforcement and choice of law—has been to treat the domestic and international situations similarly.

2. The matter of enforcement of truly foreign judgments was not before the Supreme Court in *Morguard* and La Forest J. left that question open. Consequently it is at present unclear whether enforcement of judgments from foreign countries are governed by (a) the "old' rules, (b) the approach set forth in *Morguard*, or (c) some new scheme yet to be devised. The next two cases are examples of the courts using the *Morguard* approach to deal with the problem of an international judgment.

> The judgment to be entered in this case therefore must contain a term limiting execution or recovery on it to the matrimonial community property in the hands of the defendant. It cannot affect her separate property held during the marriage nor her property acquired after the divorce. There will be leave to apply for directions of for an enquiry what property is subject to the judgment.
>
> The judgment sum may be converted into Canadian dollars as of the date of these reasons. The plaintiffs are entitled to their costs, scale two.

NOTES

1. In *Federal Deposit Insurance Corp. v. Vanstone*, [1992] 2 W.W.R. 407, (B.C.S.C., Gow J.) an application for judgment under Rule 18A of the B.C. Rules of Court (a kind of semi-summary judgment) was brought on a Oklahoma judgment given against the defendant. The defendant had been served *ex juris* in B.C. He had lived in Oklahoma for 8 years where he had been involved in the management of a bank that had failed. The plaintiff sought to recover from the defendant what it had had to pay to the bank's depositors on its failure. The defendant left Oklahoma before the action was started. The judgment of the Oklahoma court was held to be enforceable in B.C. on the application of *Morguard*. The judge noted that it would be hard to imagine a more "real and substantial" connection than that which the defendant and the notes had with Oklahoma.

2. It is not hard to imagine the advice that the defendant in *Clarke v. Lo Bianco* would have been given had he gone (as he almost certainly did) to a lawyer in B.C. Should the courts ignore this fact? If they acknowledge it what should they do?

In its judgment in *Morguard* the British Columbia Court of Appeal had rejected the old rules and substituted an approach based on the idea of "reciprocity": a Canadian province should recognize a money judgment emanating from the courts of another province if that other province had taken jurisdiction in circumstances in which the requested province would also have taken jurisdiction. This is, for example, one ground on which Canadian courts will recognize foreign divorces. The Supreme Court gives no reasons for declining to adopt this approach to enforcement. The reciprocity argument adopted by the British Columbia Court of Appeal has always had a superficial attractiveness which cases like *Indyka v. Indyka*, [1969] 1 A.C. 33, have encouraged. The grounds for the decision in *De Savoye v. Morguard Investments Ltd.*, stated by La Forest J. are inconsistent with the idea that reciprocity offers any justification for the rules for the enforcement of foreign judgments.

At best, the principle of reciprocity suggests that no court will be so arrogant as to deny enforcement to the judgment of another given in circumstances where it would itself have taken jurisdiction. Reciprocity focuses on the *courts* and on

some idea of what their relation should be. *Morguard* focuses on the *defendant*, the fairness of the foreign court's assertion of jurisdiction over him and, as we believe is inherent in *Moran*, an issue of provincial sovereignty. We believe that *Morguard* may be taken as saying, at least, that it is a poor reason for enforcing a judgment against a defendant that the enforcing court would treat a defendant before it as unfairly as the rendering court treated the defendant. Perhaps the best argument against reciprocity in the Canadian context would be the impossibility of reconciling it with the need for restrictions on provincial sovereignty; an excessive assertion of power by one province cannot be justified because another province might be prepared to assert as wide a power. Reciprocity was never a principled position; it is not necessarily defensible on any grounds to say that "What is sauce for the goose is sauce for the gander". The support for reciprocity by writers like Kennedy and Castel (referred to in the judgment of La Forest J.) was not based on any analysis of the purposes and values that might be relevant. Nevertheless, the attractiveness of that approach is obvious from the judgment in *Clarke v. Lo Bianco*.

Morguard decides that the new test for intra-federal enforcement of money judgments will depend on whether there was a real and substantial connection with the province which rendered the original judgment. What is it that must be substantially connected with the rendering province? The Supreme Court suggests that judgments of other provinces are now to be enforced, even if there has been no personal service in the jurisdiction or submission, including default judgments, if

(a) "that court has properly or appropriately exercised jurisdiction in the action." (*supra*, p. 30)

(b) there is a "real and substantial connection" with either

  (i) "the *subject-matter of the action* and the territory where the action is brought" (*supra* p. 31, Emphasis added)

  (ii) "the *damages suffered* and the jurisdiction [which rendered the original judgment]" (*supra* p. 34, Emphasis added)

  (iii) the rendering jurisdiction and the *defendant* (*supra*, pp. 27 and 31) or

  (iv) sufficient "contacts [that the rendering] jurisdiction may have to the defendant *or* the subject-matter of the suit" (*supra*, p. 31, Emphasis added)

It is not clear whether the *Morguard* rule applies to all intra-Canadian money-judgment cases or whether it is limited to situations where the rendering court took jurisdiction under its service *ex juris* rules. The old rules dictate that where

the defendant is personally served while within the territory of the rendering court then the requirement of recognition jurisdiction is met. La Forest J. assumes that such cases raise no problem, yet that is not necessarily so. It is possible for someone to be served while temporary within a province in situations where the substantial connection test is not made out. In such cases there seems little reason not to take the *Morguard* approach to enforcement.

The Supreme Court mentioned *Aetna Financial Services v. Feigelman* as an example of a case where the special nature of the Canadian federation was the basis for the decision. Another case is *Bank of Montreal v. Metropolitan Investigations Ltd.*, [1975] 2 S.C.R. 546, 50 D.L.R. (3d) 76. A dispute arose over the rights of creditors to money belonging to a bankrupt corporation, Churchill Forest Industries (Manitoba) Limited. The money was held in branches of the appellant bank and the Royal Bank of Canada in Montreal. The Manitoba courts held that this money constituted a trust fund under the *Builders and Workmen Act*, R.S.M. 1970, c. B90, s. 3, giving a lien over the money to the respondent, among others. The Manitoba judgment ordered the banks to account for and to pay the money to the receiver. When the Manitoba proceedings were started the funds claimed were already subject to certain attaching orders made in the Québec proceedings. These proceedings had been begun more than a year before the Manitoba proceedings had been started. The Supreme Court, in a judgment by Laskin C.J.C., held that the Manitoba courts could not deal with matters that were already subject to proceedings in the courts of another province. Laskin C.J.C., said: (p. 557, S.C.R., p. 83, D.L.R.)

> Since the banks were already subject to the Québec garnishment when the Manitoba proceedings began, the Manitoba judgment calls upon them to be faithless to the competent order of a sister judicial district. This court *with a reviewing and controlling authority over both the courts of Manitoba and of Québec*, cannot be expected to support such a call. Unless this court is in a position (and it not in these appeals) to rule on the validity of the Québec garnishment, it cannot with any propriety approve an order of one provincial court that purports to deal with assets already captured by the competent order of another provincial court, and particularly an order of the court of the province where those assets are situated.

(Emphasis added)

This statement can, we believe, only be regarded as the assertion of a power of the Supreme Court to review and control the relations of the various provincial courts, to keep them within their proper boundaries—a power that is not misdescribed as "constitutional". It is possible, with the judgment in *Bank of Montreal v. Metropolitan Investigations*, as with the judgment in *Moran v. Pyle National (Canada) Ltd.*, to see, not just the glimmerings of a "full faith and

credit" doctrine in Canada, but a well developed basis for one. Both *Metropolitan Investigations* and *Moran v. Pyle National (Canada) Ltd.* and, what is more important, the implications of those decisions, were almost entirely ignored in Canadian scholarly works on Conflicts. Castel, *Canadian Conflict of Laws*, 2nd ed. (1985), p. 11, has a short comment stating, "where money on deposit in the local branch of a bank is already the subject of proceedings in the court of the province where that branch is. . . , the court of another province cannot impose a trust on this money. . . ."

The Supreme Court in *Morguard* did not mention the enforcement in Québec of judgments from outside that province. Québec's enforcement rules are found in its *Civil Code* (art. 1220) and in the *Code of Civil Procedure* (arts. 178-181), and they are different both from the "old" common law rules and the new *Morguard* approach. There are three principal features of the Québec rules: (i) the merits of the original cause of action may be re-opened when the judgment brought for enforcement is from outside Canada (Art. 178); (ii) the merits may be re-opened in any judgment from within Canada if the defendant was not personally served in the other province, (Art. 179) and (iii) any judgment from outside Québec shall be denied effect where the Québec courts have been, under Québec law, vested with exclusive jurisdiction or where Québec law must, under that law and regardless of any foreign law, have been applied to the facts. This last provision was added by S.Q. 1989, c. 62, s. 4, as Article 180.1 of the *Code of Civil Procedure*. Since La Forest J. derives *Morguard*'s new approach to enforcement (at least in part) from the constitution, does that mean that it now replaces or limits the application of Québec's statutory regime?

Morguard is not only revolutionary in its (constitutionally-derived) distinction between intra-federal and international cases; it is equally so in its linking of enforcement and jurisdiction questions. The court decides that if it is reasonable for one Canadian province to assert judicial jurisdiction over a matter then it is reasonable that other Canadian provinces be required to recognize any resulting judgment.

Recall the forum *non conveniens* case of *Robinson v. Warren* (*supra*, page ?). There the Alberta defendant was unsuccessful in persuading the Nova Scotia court to decline jurisdiction. *De Savoye v. Morguard Investments Ltd.* suggests a quite different rule for the resolution of that case.

In Chapter 5, Jurisdiction of the Canadian Courts, we looked at the decision of the U.S. Supreme Court in *World-Wide Volkswagen v. Woodson* and saw that the due process clause of the U.S. Constitution places limits on the reach of state long-arm jurisdiction. We speculated that similar limits to the reach of provincial service *ex juris* rules might be found in the Canadian Constitution. We can now see that La Forest J. has found such limits in a broad range of constitutional and sub-constitutional sources.

It was argued earlier that the judgment of the Supreme Court of Canada in *Moran v. Pyle National* could be the basis for a new rationalization of the rules of both judicial jurisdiction and enforcement. It is useful to compare the equivalent position in the United States. The inter-state issue of recognition and enforcement is explicitly seen as an aspect of Constitutional Law.

The United States *Constitution* provides:

> **Article IV**
>
> Section 1: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.
>
> Section 2: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
>
> **Amendment V**
>
> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .
>
> **Amendment XIV**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction and equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

In 1790, in its first session, the Congress enacted the legislation provided for under Art. IV, s. 1 (28 U.S.C.A. §1734 (1964)):

> The records and judicial proceedings of any court of any . . . State, Territory or Possession [of the United States] . . ., or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and

> Possessions as they have by law or usage in the courts of such State, Territory of Possession from which they are taken.

It would be false to assert that there are no problems of recognition and enforcement in the United States, yet, in general, the existence of the constitutional component goes far to put the law on a more principled basis than does the common law approach. The issue raised by any question of *res judicata* or of recognition and enforcement of foreign judgments is the question of preclusion. What issues can or cannot be re-litigated in the second jurisdiction, the recognizing court?

The United States Supreme Court has given a number of responses to this question. In *Fauntleroy v. Lum* (1908), 210 U.S. 230, the Court forced the courts of Mississippi to recognize and enforce a judgment of the courts of Missouri that had been given in a cause of action (a futures trading contract) prohibited by Mississippi law. The contract had been made and was to be performed in Mississippi where all the parties lived. In *Yarborough v. Yarborough* (1933), 290 U.S. 202, the court refused to allow South Carolina courts to take jurisdiction to order a father to support his daughter (aged 16) when the father had complied with the order of a Georgia court in divorce proceedings there (three years before the South Carolina proceedings) requiring him to make a lump sum payment in support of his daughter. These cases, as we shall see, raise a number of important issues. They illustrate how far the preclusion doctrine has been applied. By way of contrast, the doctrine has not been applied to make determinations of the amount of worker's compensation final as regards an application for an additional payment in another jurisdiction: *Thomas v. Washington Gas Light Co.* (1980), 448 U.S. 261, 100 S.Ct. 2647. These issues are more extensively examined in Cramton, Currie & Kay, *Conflict of Laws* (4th ed.) (1987) and Scoles & Hay, *Conflict of Laws* (Hornbook) (1982).

The American constitutional requirement does not extend to international judgments. The practice of state courts has not been uniform. At least some states are prepared to give an international judgment the same effect as the judgment of another state court. Sometimes this result seems to be based on the (quite unjustified) assumption that, for example, a Canadian court will operate under the same restrictions as an American one, as indicated, for example, by *World-Wide Volkswagen*. This practice (and assumption) can cause American clients very great difficulty if they are sued *ex juris* in a Canadian province. A Canadian lawyer has to be very sure of *American law* before giving advice in Canada on the question whether the client should or should not appear in the Canadian proceedings.

The American position is *prima facie* much less restrictive than the common law position. For example, the *Restatement, Second, Foreign Relations Law of the United States*, (Revised), Tentative Draft No. 4 provides:

§491. Recognition and Enforcement of Foreign Judgments

(1) Except as provided in §492, a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.

(2) A judgment entitled to recognition in accordance with Subsection (1) may be enforced by any party or its successors or assigns against any other party, its successors or assigns, in accordance with the procedure for enforcement of judgments applicable where enforcement is sought.

§492. Grounds for Non-Recognition of a Foreign Judgment

(1) A judgment of the court of a foreign state may not be granted recognition by a court in the United States if:

(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the applicable laws of the rendering state and with the rules set forth in §441.

(2) A judgment of the court of a foreign state need not granted recognition in the United States if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition;

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

A more general discussion of the issues of recognition is found in Von Mehren and Trautman, "Recognition of Foreign Adjudications: A Survey and Suggested Approach" (1968), 81 *Harv. L. Rev.* 1601.

Recently the High Court of Australia also abandoned the traditional approach which viewed intra-federal and international conflicts cases as analytically identical: *Breavington v. Godleman* (1988), 62 A.L.J.R. 447. They did this in the context of a choice-of-law case, referring to a provision of the Australian constitution to justify a new intra-federal approach to choice of law in torts. (The Australians were as anxious to crawl out from under the rule in *Phillips v. Eyre* as the Ontario courts are; they now appear to have the rule in *Phillips v. Eyre* for truly foreign torts and another rule for intra-Australian torts.) In *Morguard* the Supreme Court has recognized that conflicts cases, or at least recognition and jurisdiction cases, raise constitutional concerns. Arguably this decision will have implications for our approach to choice of law as well. Recall that in *Grimes v. Cloutier* Morden J.A. indicated that for an Ontario court to impose its substantive law on the Québec defendant would be an "officious intermeddling with the legal concerns of a sister province".

The most important aspect of *De Savoye v. Morguard Investments Ltd.* is its effect on the power of the provinces to assert a power to bring those not resident in the province before its courts. *Moran v. Pyle National (Canada) Ltd.* had established the basis for the assertion of a constitutional claim: Dickson J.'s language in that case bears a striking resemblance to that of White J., giving the judgment of the majority in *World-Wide Volkswagen v. Woodson*. Implicit in *Moran v. Pyle National (Canada) Ltd.* was the argument that a court would note, as La Forest J. did in *De Savoye v. Morguard Investments Ltd.*, that it would be odd if an assertion of jurisdiction that was approved by the Supreme Court of Canada did not lead to automatic enforcement—at least within Canada—of the resulting judgment. It is not hard to find rules within Rule 17.02 of the *Rules of Court* that may be open to challenge under the new test, though perhaps the phrase "new attitude" would be preferable. It remains to be seen what will emerge as the new Canadian approach.

JUDGMENTS THAT WILL BE REFUSED ENFORCEMENT

Under the old enforcement rules there were, in addition to the jurisdictional requirements discussed above, additional bars to enforcement of judgments from other provinces and countries. In other words, even if the defendant was personally served within the jurisdiction of the rendering court or subsequently submitted to that jurisdiction, there were further arguments which might be advanced in favour of non-enforcement. *De Savoye v. Morguard Investments Ltd.* does not mention these and one of the uncertainties that remains after that case is whether and to what extent these additional bars to enforcement of judgments remain. As you examine the following four bars to enforcement consider whether the Supreme Court's reasoning in *Morguard* provides any basis for arguing that they have been or should be changed.

1. Public Policy

At one extreme, any Canadian court has power to prevent an abuse of its process by excluding those claims that it finds offensive. This is the general notion of "public policy"—the over-riding power of the court to refuse to listen to an argument or to give a remedy in certain cases. This power exists to protect the integrity and sensibilities of courts regarding certain foreign judgments. In addition to the general power there are special rules regarding certain kinds of judgments.

Boardwalk Regency Corp. v. Maalouf
(1992), 6 O.R. (3d) 737
(Ont. C.A., Lacourcière, Carthy & Arbour JJ.A.)

CARTHY J.A.:— The respondent, a resident of Ontario, borrowed money and built up a gambling debt at the appellant's casino in Atlantic City, New Jersey, failed to honour a cheque representing the ultimate debt of $43,000, permitted a default judgment to be entered in New Jersey, and now resists an action on that judgment in Ontario. The trial judge, in a judgment reported at 68 O.R. (2d) 753, found that the Ontario *Gaming Act*, R.S.O. 1980, c. 183, [now R.S.O. 1990, c. G.2] and particularly ss. 1, 4 and 5, represent a public policy in Ontario discouraging gambling, and accordingly that the action based upon the New Jersey judgment should be dismissed. The appellant says that the loan agreement was not a wagering agreement within s. 4 of the *Gaming Act*, that the proper law of the contract is that of New Jersey and s. 1 of the Act therefore has no application, and, finally, that it is not contrary to public policy in Ontario to enforce the New Jersey judgment. The respondent takes the contrary position on each of these three issues. For convenience of reference I will here set out the relevant sections of the *Gaming Act*:

> 1. Every agreement, note, bill, bond, confession of judgment, cognovit actionem, warrant of attorney to confess judgment, mortgage or other security, or conveyance, the consideration for which, or any part of it, is money or other valuable thing won by gaming, or by playing at cards, dice, tables, tennis, bowls or other game, or by betting on the sides

> The *Gaming Act* declares void a contract or agreement entered into in Ontario by way of gaming or wagering; it also prohibits recovery of money won upon a wager (s. 4). Yet, betting or gaming is not, in itself, illegal or criminal in Ontario. It would not be sound public policy, in my opinion, to permit recovery of a debt incurred outside Ontario under circumstances that would be criminal under the same circumstances in Ontario, and yet to deny recovery for gambling debts legally incurred here. To decide otherwise, in my opinion, is to force Ontario public policy, as expressed in part in the *Criminal Code* of Canada, to yield to foreign law.
>
> For these reasons, I would dismiss the appeal.

NOTES

1. The judgments in *Boardwalk Regency Corp. v. Maalouf* illustrate clearly the issues raised by the claim that the enforcement of foreign judgment would be contrary to Canadian public policy. It is, we think, safe to say that the judgment was unexpected.

2. Notice the Court of Appeal's comments on the "legality" and enforceability of the underlying contract. Are all the judges agreed that it would make no difference whether the plaintiff sued on the defendant's promise to repay the loan or on the judgment. Consider what Arbour J.A., said, *supra*, page 62, "However, the action on the New Jersey judgment . . . ."

2. Foreign Tax Claims

It is widely accepted that a foreign tax claim will not be enforced in an action on a foreign judgment: *U.S.A. v. Harden*, [1963] S.C.R. 366, 41 D.L.R. (2d) 721. We cannot explore this issue here, but it is worth noting that the matter may not be as clear as might usually be thought. Many "tax" claims are, in fact, claims for services provided by governments. Should a claim for the cost of water or sewage services used by a corporation be barred just because it is a "tax claim"?

The case of *Carrato v. United States of America* (1982), 40 O.R. (2d) 459, 141 D.L.R. (3d) 456 (H.C., Steele J.) suggests that anything as civilized as an actual court proceeding to collect on a foreign tax claim is completely otiose. The plaintiff's husband and his mother, residents of the United States, had won about $500,000.00 in a Canadian lottery. To avoid American taxes on the prize, the plaintiff, her husband and his mother moved to Canada. The United States government obtained an order of the Federal Court in Buffalo for taxes due from the plaintiff's husband, and one Horan was appointed receiver by the American court. Horan physically seized, in Canada, assets belonging to both the husband and the plaintiff. Horan had no Canadian authority to do so. The plaintiff began a series of actions arising out of the seizure of her assets by Horan. In this action she claimed damages against the United States government for the seizure of her assets. Her claim was rejected on the ground that the defendant had sovereign immunity on the basis of the *State Immunity Act*, R.S.C. 1985, c. S-18, and had

not waived it. In *Tritt v. U.S.* (1989), 33 C.P.C. (2d) 154, (Ont. H.C., Steele J.) an action against the U.S. government and a number of U.S. officials was again dismissed. This time officials employed by the U.S. government had surreptiously entered the plaintiff's premises in Canada and seized cartons of documents. The judge applied the common law rules as, the cause of action having arisen before the *State Immunity Act* came into force, the Act did not apply. The judge further held that even if the substantive provisions of the Act did not apply, the procedural ones relating to service on a foreign sovereign did apply so that, in any event, the action had not been properly commenced.

Re Sefel Geophysical Ltd., [1989] 1 W.W.R. 251,, 92 A.R. 51, 54 D.L.R. (4th) 117, (Alta. Q.B. In Bankruptcy, Forsyth J.) involved proceedings in Alberta under the *Bankruptcy Act* in respect of a corporation that had done business in Canada, several states in the United States and the United Kingdom. The corporation had originally sought protection under the *Companies' Creditors Arrangement Act* from the Alberta court but had later been petitioned into bankruptcy. The corporation's principal assets were in the U.S. While the corporation was still under the *Companies' Creditors Arrangement Act* protection, the United States Bankruptcy Court granted an order under § 304 of the U.S. *Bankruptcy Code* staying proceedings by United States creditors. These creditors later made claims in the Alberta proceedings. The Alberta court found that it was assumed by the U.S. court when it made its order that American creditors, especially American governmental creditors, would receive equivalent treatment in the Alberta proceedings that they would have received in U.S. proceedings to realize on the U.S. assets for their benefit. The case is important for the general approach illustrated by the judgment of Forsyth, J., to the court's role in a multi-jurisdictional insolvency.

Forsyth, J., referred to a number of American cases in his judgment to support the argument that the deference paid to the Alberta proceedings by the U.S. court imposed duties on or forced the recognition by the Alberta court (and the Canadian creditors) of the claims of the U.S. creditors. The judge pointed out that the U.S. court had deferred to the Alberta court on the basis of comity. He said: (pp. 123-124 (D.L.R.))

> In *Cunard* [*Cunard Steamship Company, Ltd. v. Salen Reefer Services, A.B.*, 773 F. (2d) 452 (1985)], the United States Court of Appeals refused to allow an attachment of assets in the U.S. when insolvency proceedings that were accompanied by a stay had already been commenced in Sweden. At p. 456 the Court held:
>
> > In the United States the leading case on the concept of comity is *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1985). In that case, the Supreme Court described comity as:

> the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of laws.

159 U.S. at 164, 16 S.Ct. at 143. Comity will be granted to the decision or judgment of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.

Dealing with the rationale for the applicability of comity in *Cunard* the Court held at pp. 457-458:

> The rationale underlying the granting of comity to a final foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction. The extending of comity to a foreign bankruptcy proceeding, by staying or enjoining the commencement or continuation of an action against a debtor or its property, has a somewhat different rationale. The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.

I quote *Cunard* at some length to emphasize the fact that *Cunard* was a case in which comity amounted to the recognition of a foreign bankruptcy proceeding. It was not a case in which comity was held to extend to include the application of foreign law with respect to priorities.

. . .

The other cases dealing with comity are consistent with this interpretation of comity principles. In *Drexel Burnham Lambert* [*Drexel Burnham Lambert Group Inc. v. A.W. Galadari*, 610 F.Supp. 14 (D.C.N.Y. 1985)] a proceeding in New York was dismissed on the basis of comity in deference to a concurrent receivership in Dubai. In a similar fashion, an action was dismissed in *Cornfeld* [*Cornfeld v. Investors Overseas Services Ltd.* (1979), 34 C.B.R. (N.S.) 124] when the principles of comity

> required the recognition of an existing stay in a Canadian corporate liquidation proceeding.
>
> That is the context in which comity principles operate. *They provide for the recognition of foreign liquidation proceedings in the interest of distributing the assets of a debtor in a manner that is orderly, efficient and fair.* Comity itself does not allow the judicial re-wording of local bankruptcy statutes to adapt pieces of legislation to the demands of international trade.
>
> . . .
>
> If our bankruptcy proceedings are respected and deferred to, as they were in the case at bar, I am of the opinion that the claims of foreign states should be respected in our proceedings as long as they are of a type that accords with general Canadian concepts of fairness and decency in state-imposed burdens.
>
> (Emphasis added.)

It is unclear why foreign tax claims should be enforced in liquidation proceedings but not in regular enforcement actions, and it seems fair to say that Forsyth J. could see no good reason for the blanket refusal to enforce foreign tax claims and simply distinguished the ruling authority on irrelevant grounds.

3. Foreign Penal Claims

A foreign judgment for a fine is a clear example of a foreign judgment that will not be enforced in Canada. There are, however, other kinds of claims that are not so obviously penal, yet neither are they paradigm claims for damages for breach of contract or tort. A fairly large selection of such claims arises out of legislation dealing with corporations. The next case is an example of such a claim:

Huntington v. Attrill
[1893] A.C. 150 (P.C.)

> Lord Watson:— The appellant, in June 1880, became a creditor for money lent to the Rockaway Beach Improvement Company, Limited, which carried on business in the State of New York, being incorporated pursuant to Chapter 611 of the State laws of 1875. Sect. 21 of the Act provides that: "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."
>
> The respondent was, in June 1880, a director, and in that capacity an officer of the company within the meaning of the statute. On the 10th of that month he, along with other officers of the company, signed and verified on oath, as

case, the penalty is recoverable "in the name of the people of the State of New York by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county." It does not admit of doubt that an action by the district attorney would be a suit in favour of the State, and that neither the penalty, not the decree of a New York Court, for its amount, could be enforced in a foreign country.

In one aspect of them, the provisions of sect. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial. To use the language of Mr. Justice Osler, they give "A civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public." In the opinion of the Lordships, these enactments are simply conditions upon which the Legislature permits association to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors.

Being of the opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York for punishment of an offence against their municipal law, their Lordships will humbly advise Her Majesty to reverse the judgements appealed from, and to give decree in favour of the appellant, with costs in both Courts below. The appellant must have the costs of this appeal.

NOTE

The same case arose in the U.S. when an action was brought in Maryland on the same New York judgment. The Maryland Court of Appeals (1889), 70 Md. 191, refused to enforce the judgment on the ground that it was penal. Nor could the plaintiff sue directly on the New York legislation for the same reason. Lord Watson, in a passage omitted from the extract reproduced here, refers to that judgment and declined to follow it. The United States Supreme Court, in a judgment delivered some months after the Privy Council's opinion, reversed the decision of the Maryland court and ordered the New York judgment to be enforced in Maryland. The majority judgment quotes with approval the judgment of Lord Watson.

4. Foreign Judgments Concerning Land

We have seen from our examination of the rules of judicial jurisdiction that courts will refuse to hear an action involving claims to foreign land or arising out of damage to foreign land. The converse response can be seen in the case of an action to enforce, in the jurisdiction where the land is, a foreign judgment purporting to deal with the land. As you read the following case, remember that there are a number of exceptions to the rule regarding the taking of jurisdiction

in an action involving foreign land, and that *Dicey & Morris* are very critical of the rule laid down in the *Moçambique Case*.

Duke v. Andler
[1932] S.C.R. 734; [1932] 4 D.L.R. 529.
(Duff, Rinfret, Lamont, Smith and Cannon JJ.)

[In September 1925, the appellant, George Duke, entered into an agreement of purchase and sale of land in Victoria, British Columbia. Duke was to be the purchaser. Title to the Victoria property was, in pursuance of the agreement, registered in the name of Duke. Duke conveyed to his wife, who mortgaged the property. The vendor brought an action in California against both Dukes alleging breaches of the agreement of purchase and sale. All the parties were residents of California. The California court, after hearing the evidence, ordered a re-conveyance of the Victoria property to the vendor. The Dukes refused to execute a conveyance. The clerk of the California court was authorized by the court to execute a conveyance in the Dukes' name. He did so. The vendor then brought an action in British Columbia for a declaration that by virtue of the conveyance (by the clerk) and judgment, or of the judgment alone, they were entitled to be registered as owners of the Victoria property (subject to the mortgage). The trial judge and Court of Appeal gave orders vesting the property in the vendor, plaintiff. The defendant appealed.]

The judgment of the Court was given by Smith J.: (p. 738, S.C.R.; p. 534, D.L.R.)

The general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country is not disputed.

Considering the operation of foreign law in regard to real and immovable property, Story's *Conflict of Laws* (8th ed.), p. 591, says:

> And here the general principle of the common law is, that the laws of the place where such property is situate, exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them. The title therefore to real property can be acquired, passed and lost only according to the *lex rei sitae*. This is generally, although (as we shall see) not universally, admitted by courts and jurists, foreign as well as domestic.

Then, at page 757, paragraph 543, dealing with the jurisdiction of a nation over a person in its domain, there is the following:

> A suit cannot, for instance, be maintained against him, so as absolutely to bind his property situate elsewhere, and, *a fortiori*, not so as absolutely to bind his rights and titles to immovable property situate elsewhere.

Dicey's *Conflict of Laws* (4th ed.), p. 393, citing Story and Piggott (3rd ed.), has the following:

> The courts of a foreign country have no jurisdiction—(1) to adjudicate upon the title, or the right to the possession, of any

The courts of California therefore must be assumed to have based their judgments on California law, without being influenced by any consideration of the effect on the title, of the contract and of equities arising from it and what followed, according to the law of British Columbia, and without any regard to the statute law of British Columbia bearing on the conveyance from George E. Duke to his wife.

It may be that on the facts as found, the courts of British Columbia, in applying the laws of British Columbia, would reach the same conclusion as the California courts, but it is to be remembered that findings of fact may in some cases be based on the particular law to be applied to them. For instance, a finding of fraud depends on what constitutes fraud under the particular law to be applied.

In any event, we must deal with the question as a general proposition, and not merely from the point of view of the facts in this particular case.

. . .

The question here is whether or not the judgment of the foreign court in question, adjudicating on the right and title to real property in British Columbia, is one of the exceptions to this general rule.

The numerous decisions referred to above seem to establish beyond question that such a judgment is *in personam* only, and affects the conscience of the parties within the jurisdiction of the court, and stands on an entirely different footing in the courts of the country where the land is situated from the ordinary judgment coming within the general rule, such as a foreign judgment for debt.

In the present case the plaintiffs sue in British Columbia to enforce a judgment of the California courts deciding that the plaintiffs are the owners of the British Columbia land in question, rather than the defendants, one of whom is the registered owner. In California, it must be conceded that the judgment has effect only *in personam*, but if the courts of British Columbia were obliged to enforce it between the same parties, without question, there would be no practical difference, in effect, between such a judgment and a judgment for a debt, and the distinction so much insisted on in the authorities referred to would be of no real consequence.

QUESTIONS AND NOTES

1. What alternative course of action is the Supreme Court suggesting the parties should take? Should three Californian residents, disputing the validity of a Californian contract, be forced to litigate in British Columbia?

2. Would it have mattered to Smith J. if the facts supporting the jurisdiction of the California court might have fitted within one of the exceptions to the rule found in the *Moçambique Case*? The relevant exception would be the first, i.e., that the issue arose out of a contract governed by California law.

3. As between the Dukes and the vendors, does the British Columbia court have a valid concern for the correct choice of law rule? Should the Supreme Court require a finding that the California court got the British Columbia law wrong before it ignored the California judgment? What if it were

shown that the Californian court correctly applied British Columbia law, would Smith J. still require a retrial of the same issue in British Columbia?

4. What is the precise objection of the Supreme Court to the enforcement of the California judgment (as opposed to the bringing of an action on the original cause of action)? What value is set against the value represented by the preclusion doctrine?

5. Does the following extract refute the arguments of the Supreme Court? The extract is from: Baxter, "Choice of Law and the Federal System" (1963), 16 *Stanford L. Rev.* 1, 15-17:

> [T]he need for improvement of choice criteria [in property cases] is acute. The historical reason for the traditional situs reference—legal acquiescence in the *de facto* power of the situs state to effectuate its policies—has no relevance to our federal system. Like other arbitrary choice rules, the situs rule defeats maximum realization by each state of the policies underlying its internal laws. Rules of law can be justified only by reference to their impact on the interests of people. Property, unlike those who have interests in it, does not care about its ownership or the marketability of its title. These remarks are obvious to the point of banality; it should be equally obvious that the situs choice rule is defective on its face because the relationships relevant for choice criteria are those between sovereigns and people, not those between sovereigns and property.
>
> It does not follow, of course, that the situs of property should never control. Persons who live in the vicinity of the property are the intended beneficiaries of many property laws, such as the laws of nuisance, and the location of the property and hence of those people often should control the applicability of those laws. But as to competing claims of ownership, situs is not a reliable choice criterion. Suppose, for example, that a man has lived with his wife and children for many years in State X and dies intestate leaving real estate in State Y. The law of X, that the widow takes one-third and the children take the remainder in equal shares, should control the exclusion of the law of Y, that the widow takes one-half and the children take the remainder in equal shares. The objective of intestacy laws is intra-family distribution, and because no Y party is involved, the Y policy favouring widows is not pertinent to the case.
>
> Different internal objectives would be involved, however, if the X decedent had devised Y real estate to members of his family, all of whom were domiciliaries of X, and if the terms of the will violated the permissible time period of Y's Rule Against Perpetuities but were valid under X's rule. Y attaches greater importance than X to freeing property from long-term restraints so that ownership and utilization will be subject to market forces, furthering economic development of the community. X attaches greater importance to testamentary freedom. Since real property is involved, the community and the people the Y time period is intended to benefit are easily identified as those living in Y where the property is located. Although the situs has a strong claim to the application of its perpetuity rule, that claim must be balanced against the interest of the domiciliary state in effectuating the intentions of its testator. As in the usury situation, this is a planned transaction in which the nondomiciliary can usually anticipate the impact of any intention-defeating rule announced by the situs. A reasonable accommodation of the states' interests requires application of the

> perpetuity rule of the situs except in unusual instances in which the testator was unaware that he was devising State Y real estate by his will. A case in which the Y real estate passed to the testator after he had executed a will containing a residuary clause and had then lost testamentary capacity would be such an instance. Situations in which a testator could not anticipate the application of Y's rule are sufficiently rare so that the impairment of Y's objective by the subordination of its perpetuity rule in those cases would be minimal. In these same unusual cases State X has the most persuasive claim for application of its more liberal time period, not because the objective of its perpetuity rule has become pertinent, but to implement the objective of its law of wills to facilitate planned testamentary dispositions of wealth.

6. As you can see from this extract from Baxter, the Americans have the same "land taboo" that Canada has. Despite the fact that the U.S. Constitution requires that states give full faith and credit to the judicial acts of other states that has not been interpreted to require enforcement of judgments affecting land in the requested state: see *Clarke v. Clarke* (1900), 178 U.S. 186, *Fall v. Eastin* (1909), 215 U.S. 1. However such "foreign" judgments do appear to be entitled to full faith and credit with respect to the merits of the controversy between the parties, with the requested state then being entitled to chose its own remedy. Now that *Morguard* has granted constitutional status to enforcement of judgments emanating from other provinces the approach taken in *Duke v. Andler* would appear ripe for reconsideration, at least in the inter-provincial setting. However, given the *Moçambique* bar to Canadian courts taking jurisdiction in such cases it may be some time before such a case presents itself. One area where the issue could arise is in matrimonial property disputes, where provincial legislation effectively over-rides the *Moçambique* rule and gives courts power to deal with the real property of divorcing couples regardless of where it is situated. We shall deal with this problem in more detail later.

STATUTORY PROVISIONS AND INTERNATIONAL AGREEMENTS

1. Provincial Statutes

The primary responsibility for the enforcement of foreign judgments is an aspect of s. 92(13) of the *Constitution Act*, 1867, "Property and Civil Rights in the Province". There are a number of provincial statutes dealing with the issue of the enforcement in a province of foreign judgments. Reference has already been made to Art. 178 of the Québec Civil Code, denying preclusive effect to any foreign judgment. As has been suggested, such provisions are both unusual and hard to defend. We may ignore the statutes denying preclusive effect and examine now those that offer either more expeditious or more effective procedures for enforcement of foreign judgments.

(a) Reciprocal Enforcement Legislation

All the provinces and territories, with the exception of Québec, have enacted legislation providing for the reciprocal enforcement of judgments, arbitral awards

and maintenance orders. This legislation was originally developed by the body that has become the Uniform Law Conference of Canada. The general scheme of the legislation providing for the reciprocal enforcement of judgments can be seen from the *Ontario Act* which is typical of the legislation.

Reciprocal Enforcement of Judgments Act
R.S.O. 1990, c. R.5.

1 (1) In this Act,

(a) "judgment" means a judgment or an order of a court in any civil proceedings whereby any sum of money is payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the province or territory where it was made, become enforceable in the same manner as a judgment given by a court therein;

(b) "judgment creditor" means the person by whom the judgment was obtained, and includes the executors, administrators, successors and assigns of that person;

(c) "judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the place where it was given;

(d) "original court", in relation to a judgment, means the court by which the judgment was given;

(e) "registering court", in relation to a judgment, means the court in which the judgment is registered under this act.

2(1) Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to any court in Ontario having jurisdiction over the subject-matter of the judgment in the place where the debtor resides, or, notwithstanding the subject-matter, to the Supreme Court at any time within six years after the date of the judgment registered in that court, and on any such application the court may, subject to this Act, order the judgment to be registered.

(2) Reasonable notice of the application shall be given to the judgment debtor in all cases in which he was not personally served with process in the original action and did not appear or defend or otherwise submit to the jurisdiction of the original court, but in all cases the order may be made *ex parte*.

> (NOTE--As of Dec. 31, 1990, this Act applied to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan, the Northwest Territories, and Yukon Territory.)

Other provinces have a larger range of reciprocating states. British Columbia, for example, has reciprocal arrangements with all of the Canadian provinces and territories except Québec, the Australian states of Victoria and Queensland, Austria, and the Federal Republic of Germany.

The Act does not change the basis upon which a foreign judgment may be enforced: it only provides for an expeditious method of collection of a judgment that would be enforceable under the "old" (i.e., pre-*Morguard*) common law rules. If the Act does not apply because the foreign judgment is not from a reciprocating state, the plaintiff may apply for summary judgment. A plaintiff may always choose to sue on the foreign judgment and to forego any of the procedural advantages of the more summary procedures, whether or not they are available to it.

In *De Savoye v. Morguard Investments Ltd.*, *supra*, the respondent defendant argued that since British Columbia, like the other Canadian common law provinces, seemed to have legislatively "recognized" the old common law rules by enacting reciprocal enforcement of judgments legislation, courts should not modify or reform those common law rules. (This argument and the court's response were edited out of the version of *Morguard* which appeared *supra*.) The Supreme Court's said: (76 D.L.R. (4th) 256, at 279-80)

> There is a short answer to this argument. The *Reciprocal Enforcement of Judgments Acts* in the various provinces were never intended to alter the rules of private international law. They simply provided for the registration of judgments as a more convenient procedure than was formerly available. . . .

It would appear that provincial reciprocal enforcement statutes are ripe for reform in the wake of *Morguard*. There is a proposed draft act of the Uniform Law Conference that purports to enact the rules of *De Savoye v. Morguard Investments Ltd.* and to extend it in an important respect. The principal provisions of that act are:

Uniform Enforcement of Canadian Judgments Act

Definitions

1. In this Act

"Canadian judgment" means

Judgment creditor's other rights not affected by registration

9. Neither registering a Canadian judgment nor taking other proceedings under this Act affects a judgment creditor's right

(a) to bring an action on the Canadian judgment or on the original cause of action; or

(b) to register and enforce the Canadian judgment under the [Reciprocal Enforcement of Judgments Act].

Application of Act

11. This Act applies to

(a) a Canadian judgment made in a proceeding commenced after this Act comes into force; and

(b) a Canadian judgment made in a proceeding commenced before this Act comes into force and in which the judgment debtor took part.

NOTE

1. The inclusion in the proposed act of awards of administrative tribunals is interesting. There are a number of situations where such awards might now be made. One of the most likely sources is the Securities Exchange Commission. Canadian lawyers have already been asked for opinions on the enforceability of such orders.

2. Does the draft act prohibit a court from even considering the propriety of the assertion of jurisdiction of another Canadian court?

3. Given the explicit constitutional dimension to *De Savoye v. Morguard Investments Ltd.*, what basis is there for a refusal by one provincial court to enforce the judgment of another or an award of a provincial tribunal on the ground of public policy? Remember that the Supreme Court of Canada might have to uphold the judgment or the award in proceedings based directly on the validity of the provincial legislation. Can that court say that its decision can be contrary to the public policy of another province?

4. Does s 11(a) prevent the application of *Morguard* on the exact facts of that case?

5. The British Columbia government has introduced as Bill 21 in the current session an *Enforcement of Canadian Judgments Act* which substantially adopts the Uniform Act. Section 6 of the B.C. bill provides:

(2) The Supreme Court must not make an order staying or limiting the enforcement of a registered Canadian judgment on the grounds that

(a) the judge, court or tribunal that made the judgment lacked, under principles of private international law or under the domestic law of the province or territory where the judgment was made, jurisdiction over

(i) the subject matter of the proceeding that led to the judgment, or

(ii) the judgment debtor under;

(b) the Supreme Court would have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the judge, court or tribunal that made the judgment; or

(c) a defect existed in the process or proceeding leading to the judgment.

The bill contains s. 11 in the same form as in the Uniform Act.

(b) Arbitration Awards

An award in proceedings on an arbitration is enforceable under the *Reciprocal Enforcement of Judgments Act* only "if the award has, in pursuance of the law in force in the province or territory where it was made, become enforceable in the same manner as a judgment given by a court therein" (s. 1(1)(a)). The *Uniform Reciprocal Enforcement of Judgments Act* of the Uniform Law Conference, (Proceedings 1962, 1967) is to the same effect: s. 1(1)(a)(ii). This draft legislation is, presumably, overtaken by the new proposal. These provisions regarding arbitration awards mean that leave of a judge must have been sought under the equivalent of s. 13 of the Ontario *Arbitration Act*. The former Rule 33 could not be used to enforce a foreign arbitral award. The new Rule 20.01 may be broad enough to permit such a proceeding.

The cases and references to all provincial statutes are found in McLeod, *The Conflict of Laws*, 1983, pp. 639-653.

Awards given by arbitrators are different from judgments by courts, so the enforcement process is also different. International arbitration is useful only if parties can depend on effective enforcement of awards by state agencies with minimal interference by those agencies. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as

the "New York Convention" provides for reliable and uniform enforcement of arbitral awards. The Convention attempts to balance domestic interests of the state with the need for neutral enforcement of awards by state agencies.

The Convention was drafted in 1958. Canada did not implement the Convention until 1986 due to a lack of political will and the Constitutional necessity of having all provinces enact parallel legislation. The provinces, led by British Columbia, recognized the importance of the Convention in attracting foreign business. During 1986, the federal, provincial and territorial governments passed implementing legislation, see *Foreign Arbitral Awards Act*, S.O. 1986, c. 25. This act was replaced in Ontario by the *International Commercial Arbitration Act, 1988*. This legislation implemented the UNICTRAL Model Law on International Commercial Arbitration.

The following excerpt from a paper by Professor William Graham outlines the key features of the Convention and its significance to the international trading community.

William C. Graham, *The New York Convention of 1958—A Canadian Perspective* (unpublished, (footnotes omitted))

> . . . The efficacy of the arbitral process depends largely on two factors, the certainty and finality of the proceedings and their expeditious realization free from undue interferences by the courts. As a result most legal systems which provide for arbitration as an alternative to the judicial process seek to establish limits on the degree of court control over it while putting in place some measures to ensure that manifest abuses are not tolerated. Different systems are more or less "liberal" in ensuring the complete independence of the arbitral process and this has been the subject of much debate in circles concerned with developing the arbitral process. It has particular significance to international commercial arbitration where the locus of the arbitral hearings may be selected for its neutrality and appropriateness as an arbitral centre, i.e. precisely because it has little or no connection with the substantive issues raised in the case. . .
>
> At the level of enforcement this inherent contradiction within the arbitral process, its need for independence from the normal judicial process, its ability to adopt methods different from those employed by the courts and its need for finality and certainty which ultimately relies on the state enforcement agencies, becomes most evident. Enforcement is the achilles heel of the arbitral system; it requires the aid of the state and its organs which are charged with administering justice, the courts. The whole issue, then, of the relationship of the court and the arbitral processes is brought to the fore at this point with particular emphasis on the questions of to what

degree the courts will be entitled to exercise a "droit de regard" or control over the arbitral proceedings which have led up to the award before they will authorize the implementation of measures of execution. This is the most difficult issue to be resolved in any system of enforcement, and where awards which have issued from "foreign" systems with different approaches to procedural justice, conflicts of law rules, etc., the problem of balancing the need to protect the basic values of the forum state while maintaining a liberal view of the process and avoiding parochialism becomes acute.

The Convention deals with two quite separate issues. It lays down the rules governing the enforcement of foreign awards, it also deals with the treatment of arbitration agreements by national courts, a matter which gives rise to quite specific considerations.

Insofar as the enforcement and recognition of awards is concerned the advantages which the Convention confers are primarily three.

In the first place, the successful party is relieved of the obligation of obtaining a judgment in the place of the award, the elimination of what some continental writers refer to as the double exequatur. This may represent a significant saving in time and in expense, particularly if the arbitration has taken place in a neutral forum where the defendant has no assets. This consideration is significant in Canada where, in all jurisdictions, the rules and procedures governing the enforcement of foreign awards are different from those applicable to foreign judgments, with some very significant consequences in many cases.

. . .

The question of how to treat an award which has been homologated in the place of its making prior to its being presented for execution in the forum state has had to be considered in various jurisdictions. The majority view appears to be that the Convention should apply regardless of whether a prior judgment has been obtained, otherwise requirements respecting the enforcement of foreign judgments which are more onerous than the Convention's rules for awards would defeat the purpose of the Convention.

. . .

The second feature of the Convention is that a simplified procedure is guaranteed, Article III ensuring that the enforcing state shall not impose "substantially more onerous conditions" on foreign awards than those imposed on domestic awards.

Finally, the defences available to resist enforcement are limited to those set out in Article V, a fairly restricted list of basic considerations relating to capacity of the parties, the jurisdiction of the arbitrators and public policy considerations of the state of enforcement; these will be considered in detail under Article V. By way of introduction it may be said that the grounds for refusing the recognition of a foreign award are narrower under the Convention than they would be in most private international law systems if the Convention did not apply. This certainly would be the case in Canada, with the possible exception of the province of Québec (where awards are accorded a treatment more favourable than foreign judgments) and the possible exception of certain other provinces where the application of the reciprocal enforcement of judgments legislation has been extended to apply to arbitral awards emanating from other reciprocating jurisdictions, both provincial and foreign.

In the end it may be said that the Convention puts the onus on the person challenging the award to show that it was granted in circumstances which cannot be justified, a reversal of the usual approach in most jurisdictions to the enforcement of a non-domestic judgment or award.

. . .

Articles III and IV address themselves to the procedural considerations involved in registering a foreign award. By providing that the foreign award will be treated substantially in the same manner as a domestic award the problem of obtaining a judgment in the place of the award, "the double exequatur", is eliminated. By providing in Article IV that only the award and the agreement (or a duly certified translation thereof) need be registered with the court considerable expense and variations in local requirements for proof may be avoided. In a recent case in Montreal, for example, the judge required that the arbitrator attend from Paris and swear to the authenticity of his award, an exorbitant requirement given the fairly small amount involved in that particular case.

. . .

The provisions of Article V restrict the defences to recognition and enforcement of the award to the following situations: incapacity of one or other of the parties; invalidity of the arbitral agreement pursuant to its proper law, or, if none is indicated, of the place where it is made; lack of proper notice of the proceedings or where a party was otherwise unable to present his case; if the arbitrators have exceeded their jurisdiction, but if some of the award falls within the matters referred to arbitration partial enforcement is to be granted; the composition of the arbitral

tribunal is contrary to the agreement of the parties or the law of the place of the arbitration; the award has not become binding or has been set aside by a court where it was made; the dispute is not arbitrable pursuant to the law of the place where enforcement is sought; or, the award offends public policy concerns of the country of enforcement. The latter two objections may be raised "d'office" by the Court.

. . .

[I]t is important to remember that the resolution of these various issues will often depend upon the private international law rules applied by the forum; these may require reference to other systems of law in order to determine the scope of the defences raised. This necessary consequence of the nature of the enforcement process does produce inconsistencies in the application of the Convention which result from the different private international law rules of the State parties. In considering the reference to a foreign law which would render the award unenforceable, it is to be hoped that Canadian courts will adopt the reasoning of American and other jurisdictions which see the primary focus of the process as furthering the needs of effective arbitral adjudication of disputes of an international commercial nature. The bias, then, is against applying a foreign law which would render the award invalid.

. . .

It must be recognized,however, that the Convention has had to leave room for the play of different conflict of laws rules; for example, the notion of the parties being under some incapacity "under the law applicable to them" clearly leaves room for the forum to determine the "personal law" of the parties which will determine this issue. Similarly, the proviso in Article V(1)(a) that the award not exceed the scope of the arbitration agreement, requires the construction of the arbitration agreement and the scope of the authority conferred by it, a determination to be made it is submitted, in accordance with the proper law of the arbitration agreement itself rather than that of the forum state.

. . .

Article VII provides that the Convention does not affect the validity of other bilateral or multilateral agreements respecting the recognition and enforcement of foreign arbitral awards nor deprive any party of any rights he may have by the "law or the treaties" of the country of enforcement. The drafters clearly did not wish to provide that the Convention was exclusive. This article will enable the Common law provinces to retain any arrangements which they may have with other states, provinces or countries

> under the various reciprocal enforcement laws which are in force in most provinces and which presently apply to a confusing selection of other jurisdictions. . .
>
> It is to be hoped that all jurisdictions, when passing the necessary legislation, will take advantage of the last 27 years of experience of the N.Y. Convention and frame their legislation in such a way as to minimize the types of problems which have arisen in other jurisdictions. It is also to be hoped that our Courts, when applying that legislation, will do so in such a way as to give the fullest scope to the operation of the Convention. In so doing they will be recognizing and encouraging the role of international arbitration and the contribution which it can make towards Canada's interest in a stable international investment community and an efficient and effective world trading environment.

New Legislation, the *Arbitration Act, 1991*, S.O. 1991, c. 17, establishes (Section 50) new rules for the enforcement in Ontario of awards from other provinces in Canada.

The following case is one where the new *International Commercial Arbitration Act* was used to enforce a foreign judgment arbitral award.

Schreter v. Gasmac Inc.
(1992), 7 O.R. (3d) 608, [1992] O.J. No. 257
(Ont. Ct., Gen. Div., Feldman J.)[3]

FELDMAN J.:--This is an application to enforce a foreign arbitration award under the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, or alternatively under the federal *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2nd Supp.).

Enforcement is resisted by the respondent on the following grounds:

1. The matter was commenced incorrectly as an application rather than an action and is not authorized under Rule 14 of the *Rules of Civil Procedure*, O. Reg. 560/84.

2. As the award was confirmed by a court judgment in the State of Georgia where the arbitration was held, the award has merged in the judgment and can only be enforced as a foreign judgment and not as an arbitration award.

3. The respondent has a substantial counterclaim which it has not yet asserted. This proceeding should be stayed while the respondent arbitrates the counterclaim in Georgia or asserts it in the present proceeding.

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[3] A notice of appeal was served February 24, 1992.

> In this case, the respondent had a full hearing and full argument in front of the arbitrator. The arbitrator did not accept its evidence or its position on the law. The parties agreed to submit all disputes to arbitration in Georgia and that Georgia law would apply. There is precedent in our law for the acceleration of future payments as damages for anticipatory breach, subject to the duty to mitigate (for example, in commercial leases: *Highway Properties Ltd. v. Kelly Douglas & Co.*, [1971] S.C.R. 562, 17 D.L.R. (3d) 710), so that the concept of acceleration without previous agreement cannot be said to be per se contrary to the public policy of Ontario. There is no basis in these circumstances for this court to direct the re-trial of the issues on the merits.
>
> **Conclusion**
>
> The award of the arbitrator filed with this court is therefore recognized by this court under article 35 of the Ontario Act, and may be enforced in accordance with s. 11 of that Act.

In *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, 47 N.R. 321, well before the decision in *Morguard*, the Supreme Court enforced a foreign arbitral award in circumstances where it would not have enforced a foreign judgment.

(c) Other Provincial Legislation

There are other methods by which foreign judgments may be given extraterritorial effect. Thus the *Highway Traffic Act*, R.S.O. 1990, c. H.8, provides:

> 198. — (1) The driver's licence of every person who fails to satisfy a judgment rendered against him or her by any court in Ontario that has become final by affirmation on appeal or by expiry without appeal of the time allowed for appeal, for damages on account of injury to or the death of any person, or on account of damage to property, occasioned by a motor vehicle, within fifteen days from the date upon which such judgment became final shall be suspended by the Registrar upon receiving a certificate of such final judgment from the court in which the same is rendered and after fifteen days notice has been sent to such person of intention to suspend his or her licence unless such judgment is satisfied within such period, and shall remain so suspended and shall not at any time thereafter be renewed, nor shall any new driver's licence be thereafter issued to such person, until such judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy, to the extent of the minimum limits of liability required by the *Insurance Act* in respect of motor vehicle liability policies.
>
> . . .
>
> (4) The Lieutenant Governor in Council, upon the report of the Minister that a province or state has enacted legislation similar in

> effect to subsection (1) and that such legislation extends and applies to judgments rendered and become final against residents of that province or state by any court of competent jurisdiction in Ontario, may declare that the provisions of subsection (1) shall extend and apply to judgments rendered and become final against residents of Ontario by any court of competent jurisdiction in such province or state.

There is similar legislation in other provinces: *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 95, *Motor Vehicle Act*, S.N.S. Cap. M-22, s. 203. The power of the Registrar was upheld in *Re Thomaes and Registrar of Motor Vehicles* (1977), 18 O.R. (2d) 219, 82 D.L.R. (3d) 305 (Div. Ct.) where a driver's licence was suspended because of the driver's failure to pay damages awarded against him in an action in New York. The fact that the New York judgment would not have been recognized or enforced at common law was irrelevant.

The various provincial insurance acts have provisions designed to alleviate some of the strictness of the pre-*Morguard* enforcement regime by giving the plaintiff a direct right of action against the insurer. (This may explain why the Alberta defendant in a case like *Robinson v. Warren*, *supra*, chose to appear in the Nova Scotia action.) Ontario's *Insurance Act*, R.S.O. 1990, c. I.8, which we have already mentioned, will serve as an example:

> 258(1) Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, notwithstanding that such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of the person's judgment and of any other judgments or claims against the insured covered by the contract and may, on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the money so applied.
>
> (2) No action shall be brought against an insurer under subsection 1 after the expiration of one year from the final determination of the action against the insured, including appeals if any.

The insurance legislation of the various provinces is very nearly uniform on this point: see British Columbia's *Insurance Act*, R.S.B.C. 1979, c. 200, s. 252(1) & (2), and Nova Scotia's *Insurance Act*, R.S.N.S. 1967, c. 148, s. 98(1) & (2).

2. Canadian Statutes and International Agreements

Since the Federal Court is set up by Federal legislation, the judgments of the Federal Court are enforceable across Canada. That court has, however, a very limited jurisdiction. A more interesting question concerns the Supreme Court of Canada. If a judgment of a provincial court is upheld by the Supreme Court, would such a judgment be enforceable, at common law and apart from *Morguard*, in every other province?

The convention on foreign arbitral awards discussed, *supra*, and implemented by all the provinces has also been brought into force at the national level: *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2nd Supp.) This legislation is referred to by Feldman J. in *Schreter v. Gasmac Inc.*

In April 1984, Canada signed a Convention with the United Kingdom providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters. The terms of the Convention are very similar to those of the *Reciprocal Enforcement of Judgments Acts* of the various provinces, though there are some significant differences.

The principal reason for the Convention was the accession of the United Kingdom to the European Convention of 1968, under which the United Kingdom would be required to recognize all judgments given by the courts of the other members of the European Community. The danger Canada saw was that this automatic recognition might affect Canadian assets in the United Kingdom.

An organization like the European Economic Community provides for the recognition and enforcement of intra-community judgments. There is also a *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Agreements*, 1966 which Canada has not adopted.

As you may remember, Canada was a party to the Uranium Cartel in the 1970's. When information about the cartel leaked out—a bizarre story in itself—litigation was brought in the United States against the participants. The Canadian Government not only interfered in the U.S. litigation by prohibiting the passing of information on the cartel to the court, but enacted legislation to protect Canadian corporations that might be made liable in the U.S. proceedings. Similar legislation was passed in Australia (*Foreign Proceedings Act*, 1976) and in the United Kingdom (*Protection of Trading Interests Act*, 1980). The Canadian legislation is the *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29.

The main point of these acts is to hamper the extraterritorial application of foreign antitrust laws when such application would be unduly onerous to a domestic corporation. This type of legislation is really directed against the courts of the United States which are notorious for awarding huge damage

awards—triple damages are recoverable under the U.S. anti-trust legislation—against foreign concerns having assets within the United States.

The principal provisions of the Canadian act are section 3, which permits the Attorney General to prohibit or restrict the production of Canadian documents in a foreign court or tribunal, section 5, which permits the Attorney General to prohibit a Canadian from complying with the foreign measures, section 8, which gives the Attorney General discretion not to recognize or enforce a foreign judgment where, in his opinion, "the recognition or enforcement of the judgment in Canada has adversely affected or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or otherwise has infringed or is likely to infringe Canadian sovereignty. . .", and section 9, often called the "claw-back clause", which allows a Canadian person against whom excessive damages have been awarded, to sue and recover from the party in whose favour the judgment is given.

The weakness of the remedy is one that appears in many areas of the law: if the defendant in the claw-back action, i.e. the original plaintiff in the U.S. proceedings, has no assets in Canada, or is entitled to sovereign immunity, the judgment will be of little value. This problem is compounded by two factors. First, the Act provides that the Canadian courts can entertain claw-back actions notwithstanding that the defendant is not within the jurisdiction of the court. Secondly, the assets of one corporation cannot be attached to satisfy a debt owed by its subsidiary or parent. In most claw-back proceedings, the stakes would probably be high enough to justify the cost of incorporation for any American subsidiary.

It is also questionable whether, in enacting this legislation, we have granted power to our courts in excess of customary limits of international law. Greater detail of this type of legislation, its effects and limitations, is provided in Joseph E. Neuhaus, "Power to Reverse Foreign Judgments: The British Claw-back Statute under International Law" (1981), 81 *Colum. L. Rev.* 1097.

On October 9, 1992 an order was issued under the *Extraterritorial Measures Act*: see SOR/92-584. That order dealt neither with the actions of American courts nor with antitrust law, but with a trade measure enacted by the U. S. Congress. On October 5, 1992 the Americans had passed a bill which limited commerce between Cuba and foreign subsidiaries of American corporations. Since this was likely to have an adverse affect on trade between certain Canadian corporations and Cuba, the Attorney General of Canada responded four days later with an order pursuant to s. 5 of *FEMA*. The order states that "[n]o corporation shall comply with an extraterritorial measure of the United States in respect of trade and commerce between Canada and Cuba . . . ." To date no actions have been brought for breach of this regulation, and the U.S. State Department and Canadian Department External Affairs are attempting to resolve the matter by diplomatic means.

The *Protection of Trading Interests Act 1980* was relied on by British Airways Board in litigation arising out of the collapse of Laker Airways. An order had been made under that Act prohibiting the Board from co-operating in an antitrust action brought by Laker in a United States Federal Court. The House of Lords in *British Airways Board v. Laker Airways Ltd.*, [1985] A.C. 58, [1984] 3 All E.R. 39, reversing the decision of the Court of Appeal, set aside injunctions that prevented Laker from suing in the United States. The basis for this decision was that there was only one possible forum for the litigation of Laker's claims, *viz.*, in the United States courts, and that British Airways, to maintain its injunction, would have to show that it would be unconscionable or unjust for Laker to bring its action there. On the facts this ground could not be established. The House of Lords held that the orders of the British Government under the Act were not, in the circumstances, subject to judicial review.

There are other odd examples of legislation that can have a surprising extraterritorial effect.

Ontario has legislation, the *Business Records Protection Act* R.S.O. 1990, c. B.19, which provides:

> **1.** No person shall, pursuant to or under or in a manner that would be consistent with compliance with any requirement, order, direction or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point in Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material in any way relating to the business carried on in Ontario unless such taking, sending or removal,
>
> (a) is consistent with and forms part of a regular practice of furnishing to a head office or parent company or organization outside Ontario material relating to a branch or subsidiary company or organization carrying on business in Ontario;
>
> (b) is done by or on behalf of a company or person as defined in the *Securities Act*, carrying on business in Ontario and as to a jurisdiction outside Ontario in which the securities of the company or person have been qualified for sale with the consent of the company or person;
>
> (c) is done by or on behalf of a company or person as defined in the *Securities Act*, carrying on business in Ontario as a dealer or salesperson as defined in the *Securities Act*, and as to a jurisdiction

outside Ontario in which the company or person has been registered or is otherwise qualified to carry on business as a dealer or salesman, as the case may be; or

(d) is provided for by or under any law of Ontario or of the Parliament of Canada.

As the case, *Amchem Products Inc. v. Workers' Compensation Board*, (*supra* page ?) indicates, the B.C. courts have several cases before them dealing with the litigation fall-out of the use of asbestos. In *Hunt v. T & N plc.*, [1991] 5 W.W.R. 475, (B.C.C.A., Macdonald, Gibbs and Hollinrake JJ.A.), another case dealing with claims against Québec asbestos corporations, the plaintiff claimed damages for personal injuries sustained from the inhalation of asbestos fibres. The plaintiff sought to compel discovery of business documents from defendants in Québec. The defendants objected to making discovery on the ground that the production of the records in B.C. would be a violation of the *Business Concerns Records Act* R.S.Q. 1977, c. D-12, which prohibited the disclosure of documents on grounds identical to those in the Ontario statute. The trial judge, Esson C.J.S.C., gave effect to this argument and refused to order discovery on the basis that comity required the British Columbia court to accept the Québec act as basis for defendants' non-compliance with British Columbia rules.

The plaintiff's appeal was dismissed. The Court of Appeal applied the doctrine of comity as between provinces and invoked *De Savoye v. Morguard Investments Ltd.* in support. Gibbs J.A., giving the judgment of the court, acknowledged that there may be instances where the courts of one province would refuse to recognize an enactment of another province designed to intrude into the exclusive legislative field of the first province. In such an instance, the pith and substance of the impugned statute is the derogation from or elimination of extra-provincial rights. He referred to *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)*, [1984] 1 S.C.R. 297, 47 Nfld & P.E.I.R. 125, 139 A.P.R. 125, 53 N.R. 268, 8 D.L.R. (4th) 1.

The history of the Québec legislation and that of Ontario was described by Esson C.J.S.C. in his judgment, 43 B.C.L.R. (2d) 390, [1990] 3 W.W.R. 558, 67 D.L.R. (4th) 687.

What does comity require in this situation? Does it require that British Columbia should subordinate its legislative policy expressed in its Rules of Court to that of Québec? Is "comity" an apt description for what is at stake here? How should the Supreme Court of Canada deal with arguments based on "comity" between the provinces? Is comity an intelligible concept in such a situation?